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UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 08-13555 (JMP)

5 Case No. 08-01420 (JMP) (SIPA)

6 - x

7 | In the Matter of:

8 LEHMAN BROTHERS HOLDINGS INC., et al.,

9 | Debtors.

11 | In the Matter of:

12 LEHMAN BROTHERS INC.,

13 Debtor.

14 - x

15

16 U.S. Bankruptcy Court

17 | One Bowling Green

18 | New York, New York

19

20 August 18, 2010

21 | Page

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23 | B E F O R E :

24 HON. JAMES M. PECK

25 U. S. BANKRUPTCY JUDGE

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2 HEARING re LBHI's Motion for (i) Approval of Surrender
3 Agreement in Connection With Surrender of Real Property Lease
4 and (ii) Authorization to Abandon Certain Personal Property
5 [Docket No. 10517]

6

7 HEARING re Debtors' Motion for an Order (i) Allowing LCPI to
8 Acquire Certain Loans through a Joint Venture and (ii)
9 Authorizing LCPI and LBHI to Provide Gap Funding through a Term
10 Loan, Revolver, and Preferred Equity Investment [Docket No.
11 10467]

12

13 HEARING re Motion of Lehman Brothers Holdings Inc. and Lehman
14 Commercial Paper Inc. to Amend the Racers Transaction Documents
15 [Docket No. 10464]

16

17 HEARING re Motion of Lehman Brothers Holdings Inc. and Lehman
18 Commercial Paper Inc. for Authorization to Guarantee Payment of
19 the Fees and Related Charges of Lazard Freres & Co. LLC [Docket
20 No. 10466]

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22 HEARING re Motion of the Chapter 11 Trustee of the SunCal
23 Master Debtors for Relief from the Automatic Stay [Docket No.
24 9642]

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2 HEARING re Motion of Lehman Commercial Paper Inc. for Authority
3 to (i) Consent to its Non-Debtor Affiliate Lehman ALI Inc. (a)
4 Entry into Plan Support Agreement Related to the Restructuring
5 of Innkeepers USA Trust; and (b) Consummation of the
6 Transactions Set Forth in the Plan Term Sheet; and (ii) Provide
7 Funds to Solar Finance Inc., a Non-Debtor Affiliate, to Provide
8 Debtor-in-Possession Financing [Docket No. 10465]

9

10 HEARING re Motion of Debtors and Debtors in Possession for
11 Entry of an Order to Consolidate Certain Proceedings and
12 Establish Related Procedures [Case No. 08-13555; Docket No.
13 8614; Adv. Case No. 10-03228, Docket No. 2; Adv. Case No.
14 10-03229, Docket No. 2]

15

16 HEARING re Och-Ziff Capital Management's Objection to Debtors'
17 Subpoena Duces Tecum [Docket No. 9382]

18

19 PRE-TRIAL CONFERENCE re Lehman Brothers Holdings Inc. v. USA
20 [Case No. 10-03211]

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1 P R O C E E D I N G S

2 THE COURT: Be seated, please. Good morning.

3 Mr. Perez --

4 MR. PEREZ: Good morning, Your Honor.

5 THE COURT: -- let's proceed.

6 MR. PEREZ: Alfredo Perez on behalf of the debtors.

7 Your Honor, since we filed the notice of agenda, two of the
8 matters are now fully consensual. And with the Court's
9 permission, if we could take those two matters first, SunCal
10 and RACERS, and then we'll go to the rest of the docket.

11 THE COURT: Sure, that'd be fine.

12 MR. PEREZ: Mr. Steinberg is going to present the
13 SunCal matter, Your Honor.

14 MR. STEINBERG: Good morning, Your Honor. Arthur
15 Steinberg from King & Spalding, on behalf of the debtor, LCPI,
16 Lehman Commercial Paper Inc.

17 Your Honor, this comes up in the context of a motion
18 filed by the SunCal trustee to lift the stay to sell property
19 which debtor LCPI had free and clear of liens, and to commence
20 a lawsuit against LCPI. The debtor responded to that motion
21 and basically said that it was -- should be opposed on
22 technical grounds but also, as a practical matter, that the
23 parties had come very close to negotiating a term sheet. There
24 was an ambiguity raised and we would be better off focusing our
25 efforts to try to complete, then clear up, the ambiguity in the

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1 term sheet. Your Honor had instructed the parties to see if we
2 could focus on that endeavor over the next thirty-five days.

3 Last night, we agreed to a term sheet, which has to go through
4 some internal approvals, but a term sheet which stayed fairly
5 close to the original term sheet and addressed the ambiguities.

6 There is a four-person steering committee of first
7 lien lenders, of which LCPI is the agent for the first lien
8 lenders. Two of the four members of the steering committee
9 have already signed off on the term sheet, both in economics
10 and in language. The third has signed off on in economics but
11 hasn't seen the last term sheet; we expect that to happen
12 forthcoming. The fourth is LCPI, the person who was obviously
13 doing the negotiation, is recommending it, but it has to go
14 through the internal channels at the debtor and, as well, we
15 need to be able to explain it to the creditors' committee and
16 as to the merits of the, what I will call, tweaks to the term
17 sheet, but they are tweaks they need to be able to go through.

18 I think we'd like to be able to carry this to the
19 September 22nd calendar. Hopefully by that point in time we
20 will have gone through the internal approvals, we will have a
21 motion pending for Your Honor to actually approve the term
22 sheet, and we will have -- assure everybody who needs to look
23 at it that this is the appropriate way of going forward; if
24 not, then we will have to deal with that on September 22nd.

25 So that, I think, is the agenda today. Counsel for

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1 the SunCal trustee is in court, Mr. Smiley, and I finished my
2 presentation. Unless Your Honor has any questions -- I'm not
3 sure if he has anything he would like to add.

4 THE COURT: Let's find out.

5 Is there anything that the SunCal trustee would like
6 to add?

7 MR. STEINBERG: I think Mr. Smiley's indicated that
8 I --

9 THE COURT: Mr. Smiley is -- and indicating that he
10 has no interest in speaking on the record. I can see him
11 standing toward the back of the courtroom.

12 MR. STEINBERG: Thank you, Your Honor.

13 MR. COHEN: Your Honor, if I may. This is Joshua
14 Cohen from Day Pitney, on behalf of Fidelity National Title
15 Insurance Company, on the telephone. I was wondering if I
16 could just make a brief statement on the record?

17 THE COURT: That's fine. What's your interest in
18 what's just been said, however?

19 MR. COHEN: Your Honor, Fidelity issued certain title
20 insurance policies covering deeds of trust on the SunCal
21 projects and was the -- one of the main objectors to the
22 original settlement as proposed. We were given a brief update
23 on Monday as to, sort of, the status of the negotiations, but
24 do want to make sure that we're given an adequate opportunity
25 to review the term sheet that it sounds like was approved

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1 subject to the committee approvals last night, in order to
2 ensure that we don't have similar issues that need to be vetted
3 or addressed in conjunction with the new term sheet going
4 forward.

5 THE COURT: I hear what you've said. I'm not sure
6 there's anything I can say or do to comfort you. If Mr.
7 Steinberg wishes to do that, that's fine.

8 MR. STEINBERG: Your Honor, we did have a conversation
9 with Fidelity, because obviously we would like to minimize any
10 objections. I think they had filed the objection when the
11 SunCal trustee moved to approve it in California. We're aware
12 of the objection; we would like to obviate it. So we will keep
13 them in the loop, and we will probably be in a position to
14 share the term sheet with them before the end of this week.

15 THE COURT: Is it possible for you to at least
16 indicate on this record what this term sheet means for the
17 California proceedings?

18 MR. STEINBERG: Yes, Your Honor. That by virtue of
19 the term sheet, the pending stalking horse bidder, which I
20 think was presented to Your Honor before, is going to be
21 withdrawn; that at a minimum at this point in time, that the
22 first lien lenders will make a credit bid which is in excess of
23 that first lien lenders' and we will find a broker that we --
24 that the SunCal trustee and the first lien lenders feel
25 comfortable with to try to market that stalking horse bid.

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1 The issue that I think related to Fidelity was are
2 there liens in the California properties senior to that of the
3 first lien lenders, specifically mechanic's liens and, if there
4 are, has Fidelity given title insurance to the first lien
5 lenders with respect to those mechanic's liens. They're
6 concerned about how to work through the senior -- the potential
7 senior mechanic's lien issue and what their responsibility
8 might be, and that's why I think counsel has raised to be
9 wanting to be plugged in earlier rather than later.

10 But the ultimate result will be that some portion of
11 the cash collateral that is there now will be set aside to the
12 SunCal trustee for administration of its case. And some
13 portion of the potential proceeds relating to a sale will be
14 set aside for the SunCal unsecured creditors, very similar to
15 what had been presented into the original term sheet.

16 Ultimately we're going to be asking Your Honor and the
17 California Bankruptcy Court to approve a settlement agreement,
18 and the actual sale process will be embedded in a plan of
19 reorganization to be presented in the SunCal bankruptcy case.
20 And we have agreed in this term sheet to the parameters of what
21 that plan will say as it impacts the first lien lenders and the
22 sale of the property. So that is the essence of the term
23 sheet.

24 THE COURT: Okay, fine. Thank you. Has the judge in
25 California been advised of these developments?

Page 20

1 MR. SMILEY: No, not yet, Your Honor, but we will --
2 we're going to notice that as soon as possible.

3 THE COURT: Fine. Thank you very much.

4 MR. STEINBERG: Thank you, Judge.

5 MR. COHEN: Thank you, Your Honor.

6 MR. STEINBERG: I think that is the only thing I have.
7 If I may be excused.

8 THE COURT: Anyone who's involved in this matter can
9 be excused, or stay if you wish.

10 MR. PEREZ: Your Honor, next I'd like to move to
11 docket number 10464, which is the so-called RACERS motion, Your
12 Honor. Your Honor, RACERS is a securitization trust that was
13 set up by Lehman in August of 2007. It currently holds -- it's
14 item number 3 on the agenda, Your Honor. It currently holds
15 about 500 -- more than 500 positions, including loans, equity
16 positions, a lot in real estate but also commercial loans.

17 The goal of this motion, Your Honor, is twofold: one,
18 to take out the assets, the underlying assets, from the
19 structure so that LCPI will be in a position to administer
20 those assets, not have to go through the structure to maximize
21 value when they dispose of the assets or deal with the assets;
22 the second goal of the motion is to make sure that everybody's
23 rights are preserved, that, by taking out the asset, the pot
24 will be bigger but that people's rights to the case or the
25 assets will be preserved. So we don't want to put anybody in a

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1 worse position. We certainly don't want to put anybody in a
2 better position.

3 And in connection with this motion, we have dealt
4 extensively with the SIPA trustee; with Barclays, which claims
5 an interest in a part of this; with the LBSF creditors, there
6 are two total return swaps that are part of this structure that
7 U.S. Bank, the current trustee, has filed five proofs of claim,
8 each for five billion dollars. Obviously we have preserved the
9 rights of LBHI and, frankly, any other party. From the time
10 that we filed the proposed form of order which we thought
11 accomplished that, we've had numerous comments from the various
12 parties. The order has been significantly amended. There was
13 in fact a tweak last night that hasn't been filed on the
14 record. And I do have a copy of -- it's really fairly minor,
15 but basically it says that both pre- and post-petition rights
16 are preserved. I think it said all rights were preserved, but
17 we spelled out pre- and post-petition rights. And then the
18 rights of all parties-in-interest, including -- and then the
19 long list of parties that were there. So two minor changes
20 just basically to clarify that we're preserving everybody's
21 rights.

22 We did receive an objection from U.S. Bank, which was
23 the trustee. That -- we were able to resolve that objection,
24 and basically we did three things, and that was in the form of
25 order that was filed yesterday, which was we agreed that they

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1 would be released with respect to any obligations going
2 forward; we agreed that they would be released with respect to
3 anything that happened as a result of this transaction, so that
4 the fact of the transaction and the motion would not create any
5 liability for them; we also agreed that they would not be bound
6 by the tolling agreement that exists with respect to all of the
7 various parties, the debtors plus the SIPA trustee. And it was
8 already in there, but we also agreed to pay their reasonable
9 fees and expenses, both that have accrued plus the ones that
10 they'll incur in connection with this motion.

11 I think, with those changes late last night, they
12 withdrew their objection. So at this point, Your Honor, the
13 objection -- the motion, I'm sorry, is fully consensual. I do
14 have Mr. Fitts here, who I'm prepared to proffer, to the extent
15 the Court has any questions.

16 THE COURT: In your presentation, you didn't reference
17 the ad hoc committee of Lehman creditors that filed a
18 reservation-of-rights limited objection. Did their issues go
19 away as well?

20 MR. PEREZ: Well, Your Honor, I don't think that their
21 issue goes away. I did not interpret that as an objection. I
22 really did interpret it as a reservation of rights. We did put
23 in language at their request. I think they raised really an
24 issue that transcends this motion. They filed a similar
25 position with respect to the Sun and Moon matter.

1 THE COURT: Right.

2 MR. PEREZ: And I think that, on behalf of the
3 debtors, Your Honor, I think -- from day one, you know, we have
4 an independent fiduciary, and we've been working. We fully
5 recognize that they're independent estates, and we are working
6 to preserve value in each of the estates.

7 Now, you know, there may not be a hundred people each
8 representing all of the various interests, but I do think that
9 that's something that is at the very -- you know, everybody
10 keeps in mind when they're negotiating these deals. And, you
11 know, Mr. Fitts is well aware -- I mean, he's the primary
12 person; he's well aware of the fact that there are competing
13 interests among the various estates and that there are going to
14 be different distributions among the various estates.

15 So, Your Honor, this is a very complicated
16 transaction. You know, Lehman appears -- a Lehman entity --
17 LCPI, LBSF, LBHI appear in a bunch of -- they're in a bunch of
18 places in the transaction. So there are definitely competing
19 interests, and our goal is to preserve those interests to make
20 sure that they are all adequately represented, and to maximize
21 the value of the underlying assets. Some day, either those
22 matters will be resolved consensually, or the Court's going to
23 have to resolve it themselves. But I think that you got to
24 take the first two steps, which is maximize the value and
25 preserve the rights, before you can get to the ultimate

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1 distribution.

2 THE COURT: Okay. I want to be clear that U.S. Bank,
3 as trustee, is satisfied with this arrangement, particularly in
4 light of certain aspects of the objection raised concerning the
5 qualification of a Lehman entity to step into its shoes and
6 replace them, and the issues that surround the interest of LBI
7 and the LBI trustee, which raise some questions noted in their
8 objection. First I'd like to just have it confirmed on the
9 record that U.S. Bank is satisfied with the arrangements that
10 have been just described and with the form of order. And I'd
11 also like to be assured that U.S. Bank is satisfied that it can
12 safely step aside here.

13 MR. PEREZ: Your Honor, counsel for U.S. Bank.

14 MR. PRICE: Craig Price from Chapman & Cutler, for
15 U.S. Bank.

16 We are. We've reviewed the order. We talked to our
17 client about this quite a bit, and they are satisfied.

18 THE COURT: Fine. Thank you.

19 I'd also like to clarify on the record that counsel
20 for the ad hoc committee is standing down with respect to its
21 reservation of rights.

22 MR. SHORE: With respect to the language that was
23 added to the proposed form of order, we are, Your Honor.

24 It's Chris Shore from White & Case, for the --

25 THE COURT: Thank you, Mr. Shore.

Page 25

1 Okay. This does now seem to be fully consensual.

2 MR. PEREZ: I thought it was, but I've been wrong
3 before.

4 THE COURT: All right.

5 MR. PEREZ: I don't know whether Mr. Lubell --

6 THE COURT: I would like to hear from counsel for the
7 SIPA trustee, both because there is a statement in support and
8 because there is also, if I read the papers correctly, a claim
9 that the LBI estate may have as to assets within the RACERS
10 trust and also a general statement by Lehman that that claim is
11 of no particular concern to Lehman. So those positions have
12 been staked out in the paperwork, but I'd like to be assured
13 that counsel for the SIPA trustee is satisfied with the order.

14 MR. LUBELL: Good morning, Your Honor. Dan Lubell of
15 Hughes Hubbard, for the SIPA trustee.

16 After we received the RACERS motion, we did have
17 discussions with the debtors to ensure that the proposed order
18 reflects what Mr. Perez described as the intent of the order,
19 if that is amending and terminating the RACER transaction
20 documents and deeming LCPI as the owner of the underlying
21 assets, that no parties' rights were being affected to the
22 proceeds of those underlying assets.

23 We also worked with the debtors to ensure that the
24 relief granted does not change the standard of care or the
25 duties of loyalty that existed with respect to those underlying

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1 assets in the RACER transaction documents. And on that basis
2 and the changes that were made, the trustee does support the
3 entry of the revised proposed order. And we would also note
4 that the Court retains jurisdiction should the implementation
5 or interpretation of that order fail to protect parties' rights
6 in interest with respect to the proceeds of the underlying
7 assets.

8 THE COURT: All right. Thank you.

9 MR. O'DONNELL: Your Honor? If I may, Your Honor,
10 Dennis O'Donnell, Milbank, Tweed, Hadley & McCloy, on behalf of
11 the committee.

12 Just rising because we also filed a statement in
13 support to make clear that we looked very closely at this
14 motion as well, are acutely aware of the conflicts issues
15 raised in the ad hoc committee's response, and believe that the
16 objective here is primarily operational, that all these other
17 issues, as evidenced in the order as finally submitted, are
18 issues that will be preserved for another day and are
19 adequately so preserved.

20 THE COURT: All right. The motion is granted.

21 MR. PEREZ: Thank you, Your Honor. The next matter is
22 a motion to -- it's the first matter on the agenda, motion to
23 surrender a leased premise, and Ms. Hendy's going to be
24 handling that, Your Honor.

25 THE COURT: Okay.

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1 MR. LUBELL: Your Honor, may I be excused?

2 THE COURT: Yes.

3 MR. LUBELL: Thank you.

4 MS. HENDY: Good morning, Your Honor. Amanda Hendy on
5 behalf of the debtors. As Mr. Perez said, the next item on the
6 agenda is LBHI's motion for approval of a surrender agreement
7 and for authorization to abandon certain personal property,
8 filed at docket 10517.

9 Your Honor, LBHI leases a portion of a building
10 located at 85 Tenth Avenue here in New York City. The lease
11 expires on December 31st, 2013. And LBHI has an outstanding
12 obligation under the lease of over 12.4 million dollars.
13 Because the debtors have no business purpose for the office
14 space at 85 Tenth, LBHI negotiated and entered into a surrender
15 agreement with the landlord. Pursuant to that surrender
16 agreement, the lease will expire by no later than December
17 31st, 2010 -- that's three years early -- and in exchange, LBHI
18 will pay to the landlord a fee in the amount of 3.5 million
19 dollars. LBHI will also abandon any interest it may have in
20 certain miscellaneous property and equipment remaining at
21 85 Tenth Avenue.

22 LBHI estimates that by entering into the surrender
23 agreement it will reduce its obligations under the lease by at
24 least eight million dollars, possibly more depending on the
25 exact date of surrender. Your Honor, the ultimate surrender of

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1 the lease and the surrender date depend on the landlord's
2 ability to attract a new tenant to 85 Tenth and to secure a
3 deal with that tenant.

4 The only response we received to the motion was by Mr.
5 Kuntz. In his response, which he styled as an objection, Mr.
6 Kuntz provides some general information about the building at
7 85 Tenth Avenue. He also stated that the debtors should
8 provide more information. In response to Mr. Kuntz, it should
9 be noted that the debtors do not own the building at 85 Tenth
10 Avenue but merely lease a portion of the building.

11 The motion sets forth detailed information regarding
12 the proposed transactions, including the business
13 justifications in support of LBHI's decision to enter into the
14 surrender agreement, and the fully executed surrender agreement
15 is attached to the motion.

16 I'm not sure if Mr. Kuntz has anything to say today on
17 this, but we request that his response be overruled and, unless
18 Your Honor has any questions, that the Court enter the order
19 granting the motion.

20 THE COURT: I'll hear from Mr. Kuntz, if he wishes to
21 speak. I see him in the gallery. My only question is one that
22 I probably shouldn't even be asking, because it goes to the
23 business nature of the transaction, and it's really whether or
24 not any effort was made to find a replacement tenant for the
25 premises prior to the decision to surrender and, in effect, pay

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1 what amounts to a hundred-cent dollar exit fee to the landlord.
2 So I'm interested in knowing efforts to, in effect, make a
3 better deal by obtaining a replacement tenant. And I'm also
4 interested in knowing what, if any, role Barclays has in all of
5 this, since Barclays was using the space.

6 MS. HENDY: Right. Your Honor, that does go to the
7 business decision behind this. And the lease does allow for
8 LBHI to seek a subtenant. But the only problem there is that
9 there's only three years remaining on the lease, and this
10 building, I guess, is equipped for certain data services, which
11 is what Barclays was using the space for and how the space had
12 been used pre-petition. And the debtors believe it would be
13 almost impossible to find a replacement tenant for that short
14 of a period at a space like this.

15 THE COURT: But my question is whether there was any
16 effort made to obtain such replacement tenant and, to the
17 extent you know it, if you could share that.

18 MS. HENDY: I'm not aware if -- I'm not sure if
19 they -- if LBHI actually did seek a replacement tenant.

20 THE COURT: Is there anyone in court who knows the
21 answer to that question?

22 MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank
23 Tweed.

24 Based on our separate diligence here, we were led to
25 believe that there was a nine-month effort here to seek a

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1 replacement tenant.

2 THE COURT: I'm sorry, I couldn't hear you.

3 MR. O'DONNELL: There was a nine-month effort here to
4 seek a replacement tenant, and no tenant could be found --

5 THE COURT: All right.

6 MR. O'DONNELL: -- basically because of the issues
7 highlighted by Ms. Hendy.

8 THE COURT: All right. Thank you.

9 Mr. Kuntz, do you wish to say anything at this point?

10 MR. KUNTZ: Yes, Your Honor. If I believe correctly,
11 I think the debtor filed a declaration from somebody from the
12 management team, but --

13 THE COURT: It's a declaration of William Gordon.

14 MR. KUNTZ: Right. Is he here?

15 MS. HENDY: No.

16 MR. KUNTZ: Could we adjourn to put him on the stand?

17 THE COURT: For what purpose?

18 MR. KUNTZ: I would like to ask him some questions.

19 To me it's quite absurd that Lehman provided a detailed list of
20 gold-plated golf tees that they gave away. Here's a 50,000
21 square foot space, probably loaded with all sorts of computer
22 equipment that nobody ow -- 'We don't know,' 'We don't have a
23 list.' And every lawyer in this room has probably a cell phone
24 with a camera, and I'd like to find out if they visited the
25 premises and if there's a picture and an inventory. One used

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1 Cisco router on eBay is 10,000 dollars, used.

2 Now, if the Court knows that there's half a million
3 dollars' worth of equipment the debtor's going to walk away
4 from, that's fine. The Court would be making an informed
5 decision. But I keep hearing of this de minimis stuff, and to
6 me de minimis is not a 10,000 dollar router. De minimis is a
7 used copy of the newspaper they hand out on the subway as you
8 walk to the courthouse.

9 You know, the rent on this, seventy-dollars per square
10 foot -- I know and I'm aware that the New York State Internet
11 Security Department is right now looking for a lease. And to
12 me, I think the Court needs more information before this is
13 just rubber-stamped. I mean, it's unbelievable to me that they
14 have no picture of the space that Barclays is handing over.
15 You know, I mean, it's just a simple inventory.

16 THE COURT: I don't understand your objection.

17 MR. KUNTZ: They had an inventory of the gold-plated
18 golf tees they provided.

19 THE COURT: Is your concern, Mr. Kuntz, that --

20 MR. KUNTZ: I think it's a windfall for the landlord.

21 THE COURT: I'm sorry, I'm in the middle of saying
22 something to you. Is your concern, Mr. Kuntz, in respect of
23 the property which is being left behind in the space, or is
24 your concern with respect to the reasonableness of the 3.5
25 million dollar surrender payment and the business judgment of

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1 the debtor in walking away from this liability?

2 MR. KUNTZ: Both.

3 THE COURT: Okay, well, I don't understand your
4 interest in either of those points.

5 MR. KUNTZ: My interest is as a creditor. Like I
6 said, we have a declaration that it's de minimis, nobody knows,
7 'We think it's worthless.' A ten thousan -- one router is
8 worth 10,000 dollars, used. Now, if this building -- this
9 floor, this Internet hub, or whatever you want to call it --

10 THE COURT: It's a data center.

11 MR. KUNTZ: -- data center, if it's full of equipment,
12 and the debtor wants to abandon it. And if the Court is aware
13 that it's going to be abandoning two-, three-, four-, five
14 million dollars' worth of equipment, the Court is then making
15 an informed decision. But just to say it's de minimis when
16 nobody's provided inventory, nobody has a picture -- the
17 gentleman who made the declaration, I'm sure, has a digital
18 camera available to him. You know. I owned a 50,000 square
19 foot building out in Ohio; I'm aware of how much space is in
20 there. And even de minimis assets have value in this city.

21 THE COURT: Okay --

22 MR. KUNTZ: Thank you, Your Honor.

23 THE COURT: Let me find out if Mr. Gordon is available
24 today. Frankly --

25 MS. HENDY: Well, Your Honor --

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1 THE COURT: -- I think it's extraordinary that there
2 would be a contested matter with the declarant not in court.

3 MS. HENDY: Your Honor, in response to Mr. Kuntz,
4 prior to filing the motion, Barclays had not yet vacated the
5 premises; since filing the motion, they have. And the debtors
6 have visited the site and confirmed that it is clean and that
7 the only remaining fixtures in the building are some desk
8 furniture and some cubicles, some HVAC filters and some
9 remaining boxes of cable.

10 THE COURT: All right, but where is Mr. Gordon?

11 MS. HENDY: We can reach out to him and see if he's --

12 THE COURT: Excuse me?

13 MS. HENDY: We can reach out to him if you'd like
14 to --

15 THE COURT: I think you should reach out for Mr.
16 Gordon. What we have is a contested matter with, in effect, a
17 request for the declarant to be available for questioning. And
18 I think it's good practice, whenever there is a contested
19 matter, for the declarant to be present in court to avoid this
20 kind of problem.

21 Let's adjourn this to a later time today. Assuming
22 that Mr. Gordon can be available before the close of the Monday
23 agenda, we'll recall it; otherwise, he can be available this
24 afternoon. I know Mr. Kuntz travels from various locations but
25 Nantucket in particular, and so, since he's here, let's see if

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1 we conveniently accommodate his request to have a witness.

2 MS. HENDY: Okay. Thank you, Your Honor.

3 MR. PEREZ: Your Honor, the next matter on the agenda
4 is the Sun and Moon matter, which is docket number 2. Your
5 Honor, Sun and Moon is a real estate development in Marseilles,
6 France. It has both a commercial piece and a residential
7 piece. The debt portion of this loan, of the financing of this
8 project, is held by Bankhaus. Pursuant to the Bankhaus motion,
9 LCPI was given the opportunity to purchase this loan, and it
10 didn't occur at the time that most of the closings have
11 occurred, and it's going to be purchased by a joint venture.
12 Currently, LBHI owns a part of the preferred equity in the
13 structure that will own the building. So the -- LBHI will be
14 a -- will put in preferred equity. And in addition, LCPI will
15 put in some loans.

16 Your Honor, the -- in essence, what we're seeking to
17 do is two things by this motion: One is to go ahead and
18 purchase the Bankhaus loan and, secondly, to provide what's
19 called the gap funding, in order to be able to build out the
20 property. The -- LCPI and LBHI are both going to be
21 contributing monies. LCPI will be providing an eight million
22 dollar hedge loan. In addition, LCPI will be providing the
23 revolver, up to seventeen and a half million. And that money,
24 because the project is going to be staged, it will -- in
25 essence it will be providing forty-seven and a half million,

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1 but at no time can it exceed seventeen and a half million. And
2 then LBHI will be funding the preferred equity basically on a
3 thirty-seven and a half/sixty-two and a half, with LBREP.
4 LBREP is in turn seventeen percent owned by LBHI. So to the
5 extent that there's a capital call, they will do that.

6 Your Honor, we have -- there have been -- there was an
7 objection filed by Mr. Kuntz, which we're going to address.
8 And then there has been a -- there was a reservation of rights
9 that was filed, again, by the ad hoc committee. In response to
10 that, we put in a more fulsome reservation of rights and then
11 in addition, at their request, we included in the order a
12 provision that LCPI and LBHI will attempt to harmonize their
13 positions in the capital structure so we don't find ourselves
14 in a position where one debtor would be in a position to
15 foreclose on another debtor, and then we're going to be working
16 on that.

17 Mr. Fitts is in the courtroom, and I have a --

18 THE COURT: Let me ask you about what you've just said
19 about harmonizing those positions. That's something to happen
20 in the future? That is not -- that hasn't yet been fully
21 developed?

22 MR. PEREZ: Correct, Your Honor. The -- this is a
23 very complicated structure.

24 THE COURT: I looked at some of the diagrams in
25 your --

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1 MR. PEREZ: And I have a little bit --

2 THE COURT: -- in your motion papers.

3 MR. PEREZ: I have a little bit -- if I may approach,

4 Your Honor?

5 THE COURT: Sure.

6 (Pause)

7 MR. PEREZ: Your Honor, it's a very complicated
8 structure, and there are various Lehman entities at the --
9 at -- in connection with the structure. There's also
10 significant tax and regulatory implications of who holds what.
11 But currently the only Lehman entity that has the right to
12 purchase the Bankhaus loan is LCPI. So we have to -- and
13 that's pursuant to the court order that we did.

14 Now, at some point our goal is going to be to
15 rationalize the new money that's going in, so that everybody
16 will be in a position so that the interest, in essence, will be
17 fully aligned. You know, we actually believe that the
18 interests are currently aligned, because I think that, you
19 know, based on the work that's being done, the goal is not only
20 to get a full recovery, but to get a recovery for the old
21 equity as well. And under various stress scenarios that we've
22 alluded to in the motion and that Mr. Fitts is prepared to
23 proffer, they still think that they would even get a small
24 return on the old equity.

25 So it is something that is going to happen in the

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1 future, but it's something that we're working on in order to be
2 able to address the concern. And we've created a full
3 reservation of rights to the extent that people aren't
4 satisfied with the way we handle it in the future.

5 THE COURT: All right. And what's the timing
6 imperative to resolve this prior to the time that the
7 rationalization of the respective interests has occurred?

8 MR. PEREZ: Your Honor, there is -- there are --
9 there's a need, from the standpoint of the -- to move forward
10 with the projects. I think LBREP has been, in essence, pushing
11 us to move forward with this project. And frankly, Your Honor,
12 Bankhaus was approved, I think, at the beginning of the year.
13 And literally we have been working -- or the real estate folks
14 have been working since that time to come up with a structure
15 that allows us to move forward. So there is significant need
16 to do that.

17 Secondly, Your Honor, we do have an outstanding loan
18 out there that we do need to restructure. I mean, KBC still
19 holds twelve percent of the Bankhaus loan, which is in default,
20 and we don't want to be foreclosed out. So by stepping into
21 the shoes of Bankhaus, we will hold eighty-eight percent of
22 that loan and we'll be able to restructure that loan. So
23 that's probably the biggest primary driving factor of why we
24 need to do it currently.

25 THE COURT: All right. Now, do you have a declarant

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1 for this one?

2 MR. PEREZ: I do, Your Honor. I have a short proffer
3 for Mr. Fitts, who's in the courtroom.

4 THE COURT: Is there any objection to proceeding by
5 means of a proffer?

6 MR. KUNTZ: I'd like to call him to the stand, Your
7 Honor.

8 THE COURT: Well, does that mean that you object to
9 the proffer?

10 MR. KUNTZ: Well, I'm going to ask to call him to the
11 stand anyway, but let's hear the proffer.

12 MR. PEREZ: Your Honor, this is the proffer of Mr.
13 Jeff Fitts, managing director at Alvarez & Marsal. Mr. Fitts
14 has more than nineteen years' experience in assisting insolvent
15 and troubled companies; focus on operation and financial
16 restructuring. Prior to joining A&M, he was a managing
17 director at GE Commercial Finance, and prior to that he was in
18 the workout division of Citicorp.

19 Mr. Fitts was assigned to the Lehman debtor in
20 September of 2008. He currently serves as co-head of the real
21 estate group, which includes all of the various debtors. Mr.
22 Fitts' primary responsibility includes the day-to-day
23 management and oversight of the real estate portfolio,
24 including all the finance and related activities.

25 As co-head of the real estate group, Mr. Fitts

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1 oversees a number of the employees, including Jim Blackmore,
2 Kathryn Webster and Paul Coles (ph.), who have been actively
3 involved -- who are in Europe and have been actively involved
4 in the Sun and Moon transaction. Mr. Fitts is also a member of
5 the real estate group's investment committee, which is charged
6 with approving the various decisions.

7 Mr. Fitts would testify that on January 14, 2010 the
8 Court entered the Bankhaus order which authorized LCPI to
9 purchase, among other things, Bankhaus interest in loans where
10 Bankhaus was the lender of record. These included the
11 so-called M loans, which comprise the senior debt in a mixed
12 commercial and residential project known as Sun and Moon. LBHI
13 owns an 8.9 percent equity interest in Sun and Moon through a
14 joint venture with LBREP, which owns the other 86 percent of
15 the equity.

16 Mr. Fitts would testify that at the time that the
17 Bankhaus agreement was executed and approved, it was
18 contemplated that LCPI would purchase Bankhaus' right, title
19 and interest in the M loans and would assign the M loans to an
20 entity to be determined. He would further testify that it was
21 contemplated that the ultimate transfer of such loan would be a
22 joint venture between LCPI and LBREP as shareholders.

23 Since that time, both LCPI and LBREP have agreed to
24 the acquisition of the M loans from Bankhaus, through an
25 AcquisitionCo (ph.) which will be owned thirty-seven percent by

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1 Bankhaus and sixty-two percent by LBREP and will be funded in
2 those proportions. Mr. Fitts would testify that the purchase
3 of the M loans through a joint venture will facilitate the
4 overall restructuring of the Sun and Moon project and unlock
5 the substantial value for the benefit of both debtors.

6 Mr. Fitts would testify that the Sun and Moon units
7 are currently in a state of disrepair, have been for several
8 years. When LBREP and LBHI made their initial investment, the
9 business plan was to vacate the premises and refurbish the
10 residential and commercial units and sell the residential units
11 immediately and lease the commercial units, with the aim of
12 ultimately selling the entire project as a portfolio. Mr.
13 Fitts would testify that this remains a business plan, and the
14 plan results in a total funding gap of approximately 102
15 million euros.

16 Mr. Fitts would testify that the funding gap may be
17 satisfied by funding the M loans, which are currently in
18 default, and that accordingly LCPI and LBREP are willing, upon
19 the AcquisitionCo's purchase of the debt from Bankhaus, to work
20 with KBC in order to place the appropriate waivers in place to
21 allow the continued funding of the M loans. Mr. Fitts would
22 further testify that, to maximize the LCPI and LBHI's
23 respective investments in Sun and Moon, it's in the best
24 interest of the estate to provide additional financing,
25 so-called gap financing, in both the form of debt and equity

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1 for the project. In that connection, the portion of the gap
2 funding would consist of a euro term loan, which could be used
3 to make a termination payment on an interest rate swap. This
4 is the hedging loan. In addition, there would be a 17.5
5 million dollar revolver which could be drawn down for capital
6 expenditures, as described in the original loan documents. Mr.
7 Fitts would testify that, while the total drawings on the
8 revolver is capped at 47.4 million, the outstanding balance of
9 the revolver can never exceed 17.5 million.

10 Mr. Fitts would testify that any monies coming to
11 AcquisitionCo on a senior basis would be used to pay down these
12 loans initially. In addition, there would be a preferred
13 equity investment of 40.6 million dollars, which would be split
14 62.5 percent by LBREP and 37.5 percent by LBHI, with a 25
15 percent accruing return which would come out ahead of any of
16 the existing equity and would fund the additional funding gap.
17 Mr. Fitts would testify that the funding gap amounts are
18 necessary for Sun and Moon to meet its current business plan
19 and to provide a maximum return for both LBHI and LCPI's
20 investment. The success of this project depends on the
21 rejuvenation of the areas around the Rue de la Republique in
22 Central Marseilles, and the capital expenditure program is
23 intended to have that effect.

24 Mr. Fitts would testify that the refurbishment of the
25 residential portion of the Sun and Moon project would not only

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1 increase the sale of the residential units but will also repair
2 and upgrade the facade of the buildings that will be used
3 primarily by commercial tenants, providing a more attractive
4 environment for the retailers. Mr. Fitts would testify that
5 the capital improvements on both the residential and commercial
6 portions of the project will be carried out simultaneously and
7 will complement each other, resulting in a total refurbishment
8 of this major area.

9 Mr. Fitts would testify that the funding gap needs to
10 be provided in order for Sun and Moon to meet its business plan
11 and be in a position to allow the returns that have been
12 anticipated. As co-head of the real estate group, he has
13 concluded, in his judgment, that providing this is in the best
14 interests of each of the debtors' respective estates. This --
15 and he would testify that this was reached after extensive
16 consultations and analysis that were prepared by Mr. Blakemore,
17 Ms. Webster and Mr. Coles, each which have been involved
18 directly in negotiating the terms of these agreements.

19 THE COURT: Who are all those people?

20 MR. PEREZ: Your Honor, these are the three senior
21 real estate people for Lehman in Europe --

22 THE COURT: Okay.

23 MR. PEREZ: -- who -- they report to Mr. Fitts.
24 They're basically his employees in Europe.

25 While Mr. Fitts believes in the likely success in the

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1 Sun and Moon business plan, he notes that the real estate group
2 considered how an investment would fare under stress scenarios
3 and take into account both a delay in the completion of the --
4 and exit from the project, and a delay in the ability to expend
5 the capital expenditures, a delay in sales and leasing, and a
6 decline in both residential sales and estimated rental returns,
7 and an increase in the required capital expenditures.

8 Mr. Fitts would testify that in the stress scenarios
9 that demonstrate that LCPI would still likely generate a profit
10 from its investment, LBHI would still be in a position to
11 protect its investment under a stress scenario and only in the
12 worst case would they not be able to recover the original
13 investment.

14 Mr. Fitts has testified that overall in his business
15 judgment that the further funding of the Sun and Moon project
16 is not only necessary to protect the debtors' previous
17 investments in the projects but also to ensure that the value
18 of these assets is maximized.

19 THE COURT: Okay, recognizing that Mr. Kuntz has
20 already requested the opportunity to cross-examine and that Mr.
21 Fitts is in the courtroom, is there any objection to my
22 receiving the proffer as direct testimony?

23 (No response)

24 THE COURT: There's no object and I accept it as
25 direct testimony.

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1 Is there anyone else who wishes to examine Mr. Fitts
2 when he's called to the witness stand?

3 (No response)

4 THE COURT: Probably not.

5 Mr. Kuntz, let met just ask you if you can estimate,
6 because we have a lot of people in the courtroom --

7 MR. KUNTZ: Five minutes, Your Honor.

8 THE COURT: Okay. Let's call Mr. Fitts.

9 Mr. Fitts, please raise your right hand.

10 (Witness duly sworn)

11 THE COURT: Be seated, please.

12 Before you begin, Mr. Kuntz, I just want to be clear
13 about something. In the ordinary course of the management of a
14 calendar as complicated and as lengthy as we have on our
15 omnibus hearing days, we rarely have unannounced evidentiary
16 hearings. Indeed there is a Local Rule that governs the
17 conduct of evidentiary hearings. I'm not waiving that Local
18 Rule in this instance, but I'm advising you, since you're pro
19 se, that in the future if you are going to need an evidentiary
20 hearing to prosecute an objection, there should be advance
21 notice of the fact that there's going to be an evidentiary
22 hearing. That's both --

23 MR. KUNTZ: I'll try and make it --

24 THE COURT: -- a matter of convenience to the Court
25 and a matter of convenience to the many people who are here

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1 observing but also here for other reasons.

2 MR. KUNTZ: I understand, Your Honor. Thank you.

3 CROSS-EXAMINATION

4 BY MR. KUNTZ:

5 Q. Could you explain how this property got in such bad shape?

6 A. I entered the estate in September 2008. How it got to
7 that stage I couldn't give you a history on.

8 Q. So it just happened? It just --

9 A. No, I know it didn't happen. You asked could I explain
10 how it got to this state, and the answer is I was -- showed up
11 in September 2008 and this property was in its current state at
12 that time.

13 Q. Do you have any reports or information as to how it got to
14 this condition?

15 A. Not that I can recall. I mean, I've seen a lot of
16 information on this property. Going through the history of how
17 it got to that state wasn't particularly time well spent for
18 me. I was dealing with the here and now.

19 Q. Can you give us the actual address in Marseilles?

20 A. No, I sure cannot.

21 Q. Can you -- have you done any inquiry into the economic
22 conditions in Marseilles or south of France?

23 A. Absolutely part of our underwriting was to review the
24 economic conditions of the local area and the project itself.

25 Q. Can you give us the general vacancy rates for these kinds

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1 of buildings in Marseilles?

2 A. No, I cannot.

3 Q. Can you tell us how much the debtor would lose if they
4 abandoned their interest in the property?

5 A. The debtors' equity interest, which I think was in the
6 motion, the total equity in it was 111 million euros, I
7 believe. The debtor LBHI's equity interest was, off the top of
8 my head, 8.9 million euros. And then obviously LBREP has quite
9 a large equity investment, and the estate has an interest in
10 LBREP itself.

11 MR. KUNTZ: Thank you, Your Honor.

12 THE COURT: Okay. Before you sit down, Mr. Kuntz, I
13 have a question for you. For you.

14 MR. KUNTZ: Thank you, Your Honor.

15 THE COURT: The agenda shows you listed as an
16 objector, but there's no docket reference to the objection that
17 you filed. And I haven't seen your written objection,
18 because --

19 MR. KUNTZ: On the Sun and Moon?

20 THE COURT: On Sun and Moon.

21 MR. KUNTZ: I don't have it with me, but I believe the
22 TBD, to --

23 THE COURT: I just want to make sure that you in fact
24 have done all that you need to do to be prosecuting an
25 objection. I haven't seen the papers. I saw your papers on

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1 the other -- on 85 Tenth Avenue, but not on this.

2 MR. KUNTZ: I can't answer Your Honor right now, but
3 I'm pretty sure it was filed. I think that was filed --

4 THE COURT: Well, apparently Mr. Perez has a copy, so
5 that's a good start.

6 MR. PEREZ: The only thing it doesn't have attached
7 is -- he attached a flight itinerary, because -- to suggest
8 that the Court take a field trip to the property. And there
9 are, like, Expedia or something --

10 MR. KUNTZ: Air France.

11 MR. PEREZ: -- Air France tickets for six people. But
12 that's not attached to this, Your Honor.

13 THE COURT: Mr. Kuntz, that's a very generous
14 suggestion.

15 MR. KUNTZ: I actu -- if I recall, Your Honor, I
16 believe I mailed that last week and it was docketed on the
17 16th.

18 THE COURT: Fine. I just didn't see it on the docket
19 when I was preparing for today's hearing.

20 MR. KUNTZ: But it just -- if I can make my brief
21 argument and then --

22 THE COURT: All right.

23 MR. KUNTZ: Or maybe the ad hoc committee wishes to
24 ask questions, I'm not sure.

25 THE COURT: Well, you're standing --

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1 MR. KUNTZ: Well, Your Honor basically approved
2 warehousing an empty building in Stamford, Connecticut. This
3 property is seven time zones away, in a foreign country well-
4 known for its labor strife, its construction strife, its
5 Communist labor leagues, and a city not well-received in
6 American investments, if you -- my observations, if you will.
7 And it seems to me, before the Court approves a hundred million
8 dollar maybe-it'll-work kind of situation, that the Court
9 consider adjourning the matter to Marseilles and seeing what's
10 really there. I mean, the witness doesn't even know the
11 address of the property that the Court's supposed to approve a
12 hundred million dollar investment in. Thank you.

13 THE COURT: Okay.

14 Mr. Shore is moving forward.

15 MR. SHORE: I have no questions for the witness,
16 though, so --

17 THE COURT: Well, before we excuse Mr. Fitts, let me
18 just ask Mr. Fitts a question about the business plan itself
19 and how the business plan was developed.

20 I'd like to know more about the process pursuant to
21 which you and those working with you developed a business plan
22 for the repositioning of the property, together with any
23 consultants from outside of your group that you consulted and
24 developed in the business plan in coming up with assumptions
25 you deem reasonable.

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1 THE WITNESS: When this property was purchased by
2 LBREP and LBHI, there was obviously a business plan in place at
3 that time. That business plan still exists. So the -- in
4 summary, of selling the residential portions block by block, as
5 they are rehab, and obviously leasing up the retail, as it is
6 rehabbed as well, that same business plan from, I believe, 2007
7 still exists in concept. The focus that we had is obviously,
8 given the downturn that began in September 2008, whether or not
9 that plan was still feasible and that the structure that was
10 financing it was still appropriate. So everything that was
11 done was to that end.

12 The team that was in place, Mr. Blakemore, who ran
13 Lehman's European operation, and the two people that worked for
14 him, had previously significant experience with this project.
15 The individual from LBREP, who, again, are still there and had
16 done the deal originally, and Atame (ph.), who is the third-
17 party asset manager for this project and also a small equity
18 holder, has also been involved since the beginning.

19 So from a continuity standpoint, what happened was
20 this project stalled because of the Lehman bankruptcy and the
21 financing issues that came about because of that. The
22 underlying business plan hasn't changed and was obviously
23 refreshed to understand what's going on with today's market.
24 But, in effect, it was just a confirmation that it was still
25 appropriate today as it was then. Does that answer your

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1 question?

2 THE COURT: It does, except for the involvement of any
3 independent third parties in testing the reasonableness of the
4 business plan.

5 THE WITNESS: Off the top of my head, I couldn't tell
6 you who -- whether there were independent third parties in
7 this. Again, as between the debtors' professionals, the LBREP
8 professionals and the Atame professionals, all of whom are
9 very, very experienced in the real estate development and
10 finance area, third-party -- I don't know off the top of my
11 head. I believe there was a new appraisal that was done as
12 part of this process; I want to say that was ninety days ago.
13 But, again, for us it was confirmatory. But I couldn't give
14 you off the top of my head a litany of outside third parties.
15 Frankly, there are enough people involved in this process.
16 Having outside third parties wasn't deemed something that we
17 thought was necessary.

18 THE COURT: Mr. Fitts, I take it that it is your
19 judgment, as the individual charged with this asset, that it
20 makes sense to invest additional monies into this project as
21 opposed to simply allowing the equity that Lehman has in it to
22 be lost?

23 THE WITNESS: It's absolutely my business judgment to
24 invest the additional monies. This is, as was stated in the
25 proffer, a property that is in a state of disrepair. So if you

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1 look at the alternative, which is find a way to sell out what
2 is there, you effectively have emptied out a project and would
3 be trying to sell it or liquidate it in exactly the worst time.
4 Completing the business development with this new investment
5 versus the alternatives is a far better outcome than a sale in
6 the short term.

7 THE COURT: All right. Thank you. You're excused.

8 (Witness excused)

9 THE WITNESS: Thank you.

10 THE COURT: And, Mr. Shore, it's now your turn.

11 MR. SHORE: Thank you, Your Honor. Chris Shore from
12 White & Case, on behalf of the ad hoc group.

13 We're supportive of the deal, but I have two issues to
14 present to the Court, and I'll try to be brief. The motion was
15 filed on July 27th, seeking to have the debtors -- and the part
16 we were focusing on was the new investment on a debt and equity
17 gap funding.

18 We're obviously focused on LBHI issues, and the
19 question in our mind arose, 'Why is LBHI putting in equity
20 behind LCPI?' To clarify the record, I believe Mr. Perez said
21 it was a forty million dollar loan. It's a forty million euro
22 loan -- or forty million euro investment that's going behind
23 that.

24 We immediately called debtors' counsel and set up
25 calls and, based on those calls, it's not clear that counsel or

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1 the professionals were looking at it on an estate-by-estate
2 basis and spotted that issue about why it's getting put in
3 behind. And that led to the reservation of rights. They
4 wanted to proceed now, but the idea was that they'll try to
5 harmonize that, because it's not clear from the documentation
6 that LBHI has to put in equity behind LCPI and we want to avoid
7 a situation that, if it all goes south, that LCPI's in a
8 position of controlling not only the pre-petition equity
9 investment of LBHI but also the post-petition preferred equity
10 investment.

11 That raises two issues in our mind. First of all,
12 it's difficult to do this on an ad hoc basis where we're
13 looking through a pleading and trying to figure out where these
14 issues are arising. And I think there probably needs to be
15 better disclosure going forward as to who's deciding and what
16 the respective rights of the estates are. I mean, this is a
17 big equity investment for a debtor to be making, and we can't
18 spot all the issues. And above all, the Court's being asked to
19 decide on a debtor-by-debtor basis in approving an LBHI equity
20 investment, approving an LCPI debt investment here. And I
21 think those issues need to be in the foreground.

22 We're happy with the reservation of rights, but there
23 is the whole host of interdebtor issues that are being reserved
24 on. We had the RACERS motion today that we're reserving on,
25 and it begs the question as to when we're going to resolve

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1 that. People keep saying it's reserved for another day, but we
2 don't have any visibility as to when the debtors intend to do
3 that.

4 With respect to, just, asset ownership issues, which
5 estate owns which assets, we think the disputes are in the tens
6 of billions. Talking about interdebtor issues, I think that's
7 probably a twelve-figure number.

8 Again, we've said that we need to have a process. To
9 date, there hasn't been any engagement on that. But there
10 really needs to be something done, because in order to
11 construct a plan to inform creditors as to what their
12 distributions are going to be, and to have an informed voting
13 body here, there really needs to be something going on. The
14 ball is in the debtors' court, with the help from the UCC, as
15 to coming up with a plan for that other day, and we expect
16 they're going to engage on that at some point.

17 Unless you have any questions, I have nothing further.

18 THE COURT: No, I don't.

19 MR. SHORE: Thank you.

20 MR. O'DONNELL: Your Honor, Dennis O'Donnell of
21 Milbank, on behalf of the official committee again.

22 Three things, Your Honor. One, in terms of your
23 question about independent third-party review of this
24 transaction, the committee, as has always been the case with
25 respect to significant transactions, spent a substantial amount

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1 of time reviewing this transaction; it's probably a six-month
2 process for us in terms of looking at several iterations of the
3 proposed transaction, in terms of structural issues in
4 particular. I mean, we were not -- if anyone thinks that we
5 weren't looking at how things were arranged here in terms of
6 LBHI versus LCPI, that is not the case. In fact, there were
7 earlier iterations of this transaction that had different
8 arrangements, and we worked through it and came out where we
9 came out. We agree that there are still issues that need to be
10 addressed, and the notion of trying to harmonize interests
11 makes a great deal of sense, and we'll work with the debtors in
12 that context.

13 In terms of independent valuation of the situation,
14 our financial advisor FTI was heavily involved in looking at
15 this, did use its own European resources to confirm that the
16 economic conditions in Marseilles make this an investment worth
17 making, and you should add that to your considerations.

18 And finally in terms of Mr. Shore's comments, we, as I
19 said previously, are very aware of the intradebtor issues here.
20 They do need to be resolved, but we believe they'll be resolved
21 as part of an ongoing plan process that the Court is aware of
22 and do not need to be addressed further today.

23 THE COURT: All right.

24 MR. PEREZ: Two points, Your Honor. It is forty
25 million euros, but LBHI's percentage is thirty-five percent.

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1 So it's about fourteen, fifteen million dollars -- euros, I'm
2 sorry.

3 Second, Your Honor, we are aware of Mr. Shore's
4 issues, and I think we're working toward, you know, coming up
5 with a process to resolve those issues; I just don't think
6 we're in a position to do that today. I think right now our
7 goal, frankly, not different from what we did with RACERS:
8 maximize the dollars that we're talking about and make sure
9 that everybody's rights are preserved. And I may sound like a
10 broken record, but one of these days I'll have a proposal.

11 THE COURT: I'm sure you will.

12 I'm approving the transaction. It's a very
13 complicated transaction. And the chart is probably more
14 indicative of the kinds of real estate investment structures
15 that were current in 2005 to 2007 than they are indicative of
16 anything that a rational person would put on a piece of paper
17 today.

18 The unbundling and unpacking of these transactions
19 seems to have become Mr. Perez's principal work in this case,
20 and I don't envy his task. The RACERS transaction, which
21 preceded the current motion, is but one example of a number of
22 similar transactions that need to be rationalized, to use the
23 term that has been described during the argument today, in
24 order to move forward in maximizing value for the estate and
25 its creditors.

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1 Mr. Kuntz is the only objector to this transaction,
2 and I think it's notable that the creditors' committee which
3 has a subcommittee focused on real estate assets, and the ad
4 hoc committee that has the resources to retain its own
5 professionals, both support the business judgment that
6 underlies the investment in this dilapidated real estate
7 project in Marseilles.

8 As was the case with the piece of property in
9 Connecticut that originally motivated Mr. Kuntz to take an
10 active role in connection with real estate matters in this
11 bankruptcy case, the portfolio of real estate that Lehman
12 invested in is a given. The question becomes how best to
13 reposition those assets and improve the overall realization for
14 creditors with respect to investments that have already been
15 made.

16 I'm not going to second-guess the judgment that has
17 been made by Mr. Fitts and those who work with him; nor am I
18 going to second-guess the judgment of the creditors' committee
19 that has reviewed this transaction. I'm approving it. I'm
20 overruling Mr. Kuntz's objection but would note that, given the
21 location of the property in Marseilles, and given the
22 statements that have been made regarding the property's
23 condition, it is not readily apparent, without close
24 investigation, that this is the kind of investment that one
25 would ordinarily choose to make. I accept it, however, as the

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1 debtors' business judgment and I approve it.

2 MR. PEREZ: Thank you, Your Honor. I believe those
3 are the matters that Mr. Fitts was here on. May he be excused?

4 THE COURT: Mr. Fitts, you may be excused.

5 MR. PEREZ: Your Honor, the next matter on the agenda
6 is the motion to provide Lazard an indemnity with respect to
7 their retention in connection with the Innkeepers case.

8 THE COURT: Okay.

9 MR. PEREZ: Your Honor, in connection with the
10 Innkeepers case, Lehman ALI, who is the holder of the loan, has
11 retained Lazard to be their financial advisor. Their monthly
12 fee is 150,000 dollars. Their fee, if the matter is
13 restructured, is a million-five. The reason why the motion is
14 being filed in this court is because LBHI has agreed to
15 backstop Lehman ALI in the event that Innkeepers, in their
16 case, doesn't pay the amounts owed as well as provide an
17 indemnity.

18 In addition, Your Honor, because LCPI has the economic
19 interest in the Innkeepers loan, they've agreed to, in essence,
20 indemnify LBHI to the extent that LBHI's called upon to do it.
21 So it'll be coming out of the LCPI estate.

22 There have been -- there were two changes that were
23 made to the order as filed; one change reflected an adjustment
24 in the monthly amount in the event that it goes past ten
25 months, and that was done at the request of the committee. The

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1 other change was to make clear that LCPI had the authority to
2 reimburse LBHI, to the extent that it was called upon to do it.

3 We did file a declaration by Mr. Lascher, who is the
4 principal. And he's here in the courtroom in connection with
5 the Innkeepers motion and we have a proffer for him. But in
6 connection with that, he's here; he did file a declaration in
7 support of that motion. We did receive one objection from Mr.
8 Kuntz. But that's the sum and substance of the motion, Your
9 Honor.

10 THE COURT: Okay.

11 Mr. Kuntz, what's your position?

12 MR. KUNTZ: I think, as everybody in the court knows,
13 Lazard is one of the major financial institutions of this
14 country. And from what I understand, they manage a hundred
15 billion dollars in assets. I don't think it's the business of
16 the debtor, or any of the debtors, to guarantee Lazard fees in
17 another case where they're engaged as a professional. It just,
18 to me, is ludicrous. If Lazard is not willing to run the risk
19 of nonpayment after being engaged as a professional in the
20 Innkeepers case, then they can get out of the kitchen, so to
21 speak. There's any number of other professional firms that
22 would be more than happy to take up Innkeepers and add that to
23 their, you know, whatever you'd call it, CV of cases that
24 they've done, and run the risk of nonpayment. It just -- to
25 me, it's just racking up more professional fees in this case.

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1 I mean, just the other day, Mr. Miller sat here for
2 two hours with Mr. Feinberg (ph.); 4- or 5,000 dollars in fees
3 that they're going to be looking to be paid to merely backstop
4 the claims procedure. It just -- the clock's running and
5 running and running, and every big-name firm comes -- I mean,
6 Your Honor has approved almost a thousand applications for
7 attorneys out of this district to be engaged in this case.
8 Now, maybe a thousand's a little high, but it seems to me that,
9 if Lazard wants to take the engagement of Innkeepers, they can
10 look to Innkeepers to be paid, period.

11 THE COURT: Okay. I understand your position.

12 MR. KUNTZ: And I look forward to Appaloosa's
13 presentation.

14 MR. PEREZ: Your Honor, just -- I just want to make
15 sure the record is correct. Innkeepers, I believe, has their
16 own financial advisor, Molis. Lazard is being retained on
17 behalf of Lehman, who is a lender to Innkeepers. And
18 Innkeepers, as part of the plan support agreement, has agreed
19 to reimburse Lazard. So what we're really looking at here is a
20 client reimbursing its own professional to the extent that the
21 borrower doesn't pay.

22 THE COURT: I understand.

23 Is there anyone here on behalf of Lazard?

24 MR. PEREZ: Mr. Aebersold is here, Your Honor.

25 THE COURT: Is there anything that Lazard wishes to

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1 say or contribute to this contested matter?

2 There's no obligation to say anything, but do you wish
3 to say anything as to why it is reasonable and appropriate for
4 Lazard to be requesting this kind of belt-and-suspenders
5 financial support for the engagement in the Innkeepers matter?

6 MR. AEBERSOLD: Yes, Your Honor.

7 This is Brandon Aebersold from Lazard.

8 The way that our engagement --

9 THE COURT: Why don't you come all the way forward.

10 (Pause)

11 MR. AEBERSOLD: Hi, Your Honor. It's Brandon
12 Aebersold with Lazard. I worked with Lehman Brothers,
13 representing them as a lender in the Innkeepers case.

14 The reason that this is necessary in this instance is
15 our engagement letter, which is actually signed by Dechert,
16 who's an advisor to Lehman as the lender -- the company,
17 Innkeepers, is a party to that engagement, but they're only
18 obligated to pay our fees in the event that a transaction is
19 consummated.

20 As such, Lehman ALI is also a party to that engagement
21 letter. However, the creditworthiness of Lehman ALI, without
22 having enough information to make that judgment, we felt that
23 it was necessary that, in the event that that transaction's not
24 consummated with Innkeepers, and if the creditworthiness of
25 Lehman ALI were not of substance that we'd feel comfortable, we

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1 would need a backstop to those fees from LBHI in this
2 proceeding.

3 So there is a risk in this matter that, to the extent
4 the transaction is not consummated with the company in the
5 Innkeepers matter, that they would not be obligated to pay our
6 fees.

7 THE COURT: Now, there are monthly fees and then there
8 is a so-called success fee when a transaction is consummated,
9 correct?

10 MR. AEBERSOLD: That is correct, Your Honor.

11 THE COURT: You're not talking about a guarantee of
12 the transaction fee; you're talking about a guarantee of the
13 monthly fee?

14 MR. AEBERSOLD: No, Your Honor. It's actually -- it
15 is essentially a guarantee of the overall fee, which includes
16 the monthly fees and the restructuring fees. A percentage of
17 those monthly fees credit against the transaction fee. So, in
18 essence, the arrangement -- and there's three parties to our
19 engagement letter; the first is the company, which is
20 Innkeepers, who has agreed to pay our fees in the event a
21 transaction is consummated with them. In the event that that
22 is not the case or Innkeepers does not fulfill those
23 obligations, Lehman ALI would be the party that would pay those
24 fees. However, in the event that neither the company nor
25 Lehman ALI pays Lazard's fees, this motion is for LBHI to be

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1 allowed to make those payments.

2 THE COURT: Okay, well, here's what I'm just trying to
3 understand. Assuming no transaction is consummated in the
4 context of the Innkeepers bankruptcy case, does Lehman ALI or
5 LBHI, under this arrangement, end up obligated to pay your fees
6 notwithstanding the fact that a transaction didn't become a
7 consummated transaction, or is it only an undertaking to cover
8 any monthly fees that haven't yet been paid in accordance with
9 the engagement letter?

10 MR. AEBERSOLD: In the event our fees are not paid
11 pursuant to the engagement letter, either the company or Lehman
12 ALI, for whatever reason -- LBHI would be obligated to make
13 those payments. There's a nuance here with respect to when the
14 company, Innkeepers, is obligated to pay our fees, and I think
15 that that may be a nuance I'll describe here is that it is a
16 transaction that is consummated amicably with the company;
17 however there could be a number of permutations of how this
18 loan is actually restructured at the end of the day. And in
19 the event, for example, a transaction is done away from the
20 company, they are no longer obligated to pay our fee under our
21 engagement letter.

22 The reason it makes sense from our perspective to have
23 this backstop is we don't want an incentive to do a deal with
24 the company in order so that they would pay our fees if there
25 wasn't a creditworthy party to be able to pay that fee in the

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1 event we did another transaction, because our intent obviously
2 is to maximize to Lehman as the lender here.

3 THE COURT: Okay, I think I understand that.

4 MR. PEREZ: Your Honor, just if I may. I think there
5 are two reasons really for the backstop; number one is LCPI
6 actually owns the economics of this. Lehman ALI is the lender
7 of record, but LCPI owns the economics. But the second
8 situation is, Your Honor, there could be circumstances where,
9 pursuant to the engagement letter, the company would not be
10 obliga -- I mean, I'm sorry, Innkeepers would not be obligated
11 to pay. But in our business judgment we determined to do
12 another transaction which would result in the -- in a
13 transaction fee being owed that wouldn't be owed by Innkeepers,
14 because they did a transaction away from Innkeepers, Your
15 Honor. Those are the two circumstances.

16 THE COURT: But a transaction fee would not be owed in
17 any event unless a transaction of some sort --

18 MR. PEREZ: Exactly.

19 THE COURT: -- is consummated, correct?

20 MR. PEREZ: Correct.

21 MR. AEBERSOLD: That is correct, Your Honor.

22 MR. STEINBERG: That's correct.

23 THE COURT: All right.

24 Is there anyone else who wishes to be heard on this?

25 (No response)

1 THE COURT: Having been better informed as to the
2 Lazard position and as to the circumstances for payment as a
3 result of the colloquy, I overrule the objection of Mr. Kuntz,
4 although I recognize his position that firms such as Lazard
5 might be more willing to assume risks than they actually are.

6 The engagement letter is relatively standard for
7 financial advisory and investment banking type services in
8 Chapter 11 cases. What makes this highly unusual, however, is
9 that we're talking about investment banking services that are
10 being rendered in a bankruptcy case which is currently pending
11 down the hall from this courtroom, the Innkeepers case; Lazard
12 is an advisor to Lehman, retained in this case; they are acting
13 as an advisor to a nondebtor, Lehman ALI, in connection with
14 the other parallel bankruptcy case which is pending before
15 Judge Chapman; and they are seeking what amounts to backstop
16 fee protection, in connection with their services in that other
17 case, from the debtors here, Lehman Brothers Holdings and
18 Lehman Commercial Paper.

19 The objection of Mr. Kuntz goes to, in effect, the
20 business risk judgment of Lazard as an advisor and doesn't go
21 to the question of whether or not it is in the best interests
22 of the Lehman estate to have appropriate representation in the
23 Innkeepers case in connection with the secured claims that are
24 being protected there. Under the circumstances, I overrule Mr.
25 Kuntz's objection and grant the motion to support the fees and

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1 related charges of Lazard.

2 MR. PEREZ: Thank you, Your Honor. Your Honor, I've
3 just been informed that Mr. Gordon is sick and at the doctor's,
4 so we will need to adjourn the hearing until the next available
5 date --

6 THE COURT: Okay.

7 MR. PEREZ: -- when he's available.

8 THE COURT: We'll adjourn it to the next omnibus
9 hearing, unless Mr. Kuntz wishes to reconsider his objection
10 after he has had a chance to review information that might be
11 provided to him concerning the present contents that have been
12 left in these premises.

13 MR. PEREZ: We'll try to do that. We'll try to get
14 him some pictures. And -- I was going to say that I didn't
15 know whether this building was actually on Tenth Avenue or
16 Eleventh Avenue, but I didn't have a chance to do that.

17 Your Honor, the last matter before the Court that I'm
18 handling is --

19 MR. KUNTZ: May I be heard on that, Your Honor?

20 THE COURT: On what?

21 MR. KUNTZ: Lois Weiss, who's a real estate columnist
22 for the New York Post, put a small blurb in her column about
23 this. I believe she asked for access to the building, which
24 was refused. I think it would be very helpful for the debtor
25 to basically -- I mean, I'll even buy them a digital camera, if

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1 they're short on money, to, like, just have some pictures.
2 Let's see if there's equipment in there, if it's really broom-
3 clean empty.

4 THE COURT: There's really nothing more to discuss on
5 this. What I --

6 MR. KUNTZ: Thank you, Your Honor.

7 THE COURT: What I've said is that either there's
8 going to be an evidentiary hearing at the next omnibus hearing
9 or, if you and the representatives of the debtor are able to
10 share information that satisfies you, perhaps you'll withdraw
11 your objection. That's all. That's all I said. Nothing more
12 to say on it.

13 Let's proceed with the next matter.

14 MR. PEREZ: Your Honor, the next matter on the agenda
15 is the Innkeepers motion, and that's a motion to approve a plan
16 support agreement. Your Honor, Lehman currently holds a 220
17 million dollar defaulted mortgage loan with Innkeepers' it's
18 secured by twenty of the hotel properties -- twenty of the
19 seventy-two hotel properties that Innkeepers has. Innkeepers,
20 as the Court is aware, is a case pending in front of Judge
21 Chapman. There is a motion filed in that case, which will be
22 heard, I think, either August 31st or September 1st, to approve
23 the assumption of the plan support agreement that we're seeking
24 to approve here first before we go to that Court.

25 The -- in essence, what LCPI has is a defaulted loan,

1 and they've negotiated with their borrower, and they've
2 negotiated a restructuring with their borrower, and that
3 restructuring has, you know, basically three fundamental
4 components: The first one is that we're going to convert our
5 debt to equity; the next one is that we're going to make --
6 that we're going to monetize at least half of that for no less
7 than 107 million dollars; and the third one is that we're going
8 to use approximately 17 million -- 17-1/2 million dollars to
9 fund a post-petition DIP loan, which is intended to fund the
10 property improvement plans and to fund other capital
11 expenditures on the 20 hotels that we have a lien on, and some
12 of that money is required to be put in by the franchisors,
13 Marriott, in connection with their -- with the flagging of the
14 hotels as Marriott.

15 You know, the debtor has twenty-three of these PIPs
16 with respect to hotels; some of them involve hotels that we
17 have a lien on. So this money is intended -- there's a
18 separate fifty million dollar loan -- DIP loan to do those
19 improvements on the other hotels.

20 Your Honor, this motion is a motion that would be
21 covered by our real estate protocols, and in our papers we
22 indicated there have been three real estate protocols. There
23 actually have been in fact four, four, real estate protocols; I
24 forgot the one that was signed on June 17th.

25 But for the fact that this exceeded the amounts in the

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1 protocols, this is exactly what you would anticipate. The
2 steps that we have taken and what we have done is precisely
3 what a responsible lender would do in order to collect on their
4 loan, and we're doing it in two different ways.

5 The transactions are really interdependent, because
6 you have a conversion of the debt to equity to delever the
7 company, while at the same time monetizing a substantial
8 portion, and getting a big cash payment to boot.

9 Your Honor, there have been -- there's been one
10 objection and, you know, I'm sure the Court has reviewed that
11 objection and our response. We believe, in our business
12 judgment, that this is the appropriate way to restructure the
13 loan and, frankly, would request that the Court enter it. We
14 have Mr. Lascher available here; he's the person who put in the
15 declaration. I have a short proffer for him, if appropriate,
16 as to the debtors' business judgment with respect to why we did
17 this.

18 But, Your Honor, this is not extraordinary; this is
19 not something, in my mind, the least bit unusual to do. We're
20 actively managing and working through our assets. In RACERS
21 alone, there's over 500 positions. You know, we have to be
22 able to move forward. I think this is a way to move forward.

23 Another comment, Your Honor, which I believe is -- is
24 that somehow this Court is being asked to prejudge what's going
25 on in the Innkeepers case. I don't think that could be further

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1 from the truth. We attached kind of the relevant portions of
2 the transcript. I think Judge Chapman is fully aware that all
3 these matters are going to be brought to you beforehand. You
4 know, we know what happens when courts don't coordinate as a
5 result of other cases that the Court's been aware of. We're
6 asking -- we're simply asking permission to go to the next
7 step. And all of those other steps are going to happen there.

8 If we get 100 percent of the equity, if we can sell it
9 for not less than 107 million dollars, and if our loan doesn't
10 exceed 17-1/2 million dollars, we have authority. If one of
11 those things changes, obviously we need to come back. But at
12 least as it relates to the issues that are going to be
13 initially before Judge Chapman, what we're seeking is authority
14 to go forward so we don't have the issue of, kind of, the
15 dueling debtors. We want to avoid that. It just doesn't make
16 any sense, Your Honor.

17 THE COURT: What position do you take as to the
18 standing of Appaloosa to object as a party-in-interest to this
19 transaction? There are some suggestions in your reply papers
20 that standing is suspect, but I don't think you come out in so
21 many words as --

22 MR. PEREZ: Well, Your Honor --

23 THE COURT: -- to say they don't have standing.

24 MR. PEREZ: Well, Your Honor, I'll tell you exactly
25 what happened. We got the papers, and first thing I did was I

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1 asked to see whether a proof of claim had been filed. There
2 was no proof of claim filed. So I sent Ms. Strickland an
3 e-mail saying 'Look, I haven't seen a proof of claim,' and she
4 indicated that she -- that they had bought a piece of the
5 Bankhaus position and that she was on vacation, so we couldn't
6 speak. So I said 'Okay, fine.' I went on the docket to look
7 for the -- to see who had bought the Bankhaus position, and
8 there is a transfer to Deutsche Bank, which I think was filed
9 on July 15th.

10 Now, it's very possible, and probably likely, that
11 Deutsche Bank didn't hold that. So they could be one of the
12 people who purchased it. I have no independent knowledge of
13 that. It's not on the docket.

14 THE COURT: Okay.

15 MR. PEREZ: As I said, Mr. Lascher is here. I have a
16 short proffer with the business judgment --

17 THE COURT: Well, maybe just to do this in the right
18 order, we should deal with the proffer and then deal with the
19 objections and any parties who support the motion.

20 MR. PEREZ: Okay, Your Honor, thank you. If called to
21 testify, Michael Lascher would indicate that he has worked at
22 Lehman since 2004, specializing in commercial real estate,
23 finance and capital markets. While at Lehman, he originated,
24 structured and closed complex loan transactions for
25 securitization and syndications, and assisted in the marketing

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1 of whole loans, B notes, mezzanine loans to secondary market
2 participants.

3 Prior to joining Lehman, he practiced for five years
4 in the real estate group of Cadwalader. He has a bachelor's
5 degree from the University of Pennsylvania, and JD from Cardozo
6 Law School.

7 Mr. Lascher is currently an employee of Lamco and is
8 responsible for the oversight of Lehman's hospitality
9 investments. And, Your Honor, the other co-head of the real
10 estate group is Ms. Nancy Shanik, who is here also in the
11 courtroom. She's the A&M managing director responsible for
12 that, co-head with Mr. Fitts who oversees the other things. So
13 just so the Court recognize her.

14 In his capacity, he's either actively involved or
15 overseeing the Lehman employees who have been actively involved
16 in finalizing the terms of the transaction described in the
17 motion, because LCPI has the economic interest in the mortgage
18 loan. And I don't want to take up the Court's time, but
19 because of the MetLife transaction, LCPI actually has the
20 economic interest. I don't know whether that's an issue, but I
21 don't think it is. Nobody's raised it, but it's really --
22 we'll refer to LCPI instead of LCPI and ALI.

23 Mr. Lascher would testify that, beginning in April of
24 2010, Innkeepers and LCPI and engaged in numerous negotiations
25 to outline a potential restructuring of Innkeepers that would

1 maximize LCPI's return on the mortgage loan, and that in
2 connection with these discussions the debtors have worked
3 closely with their legal and financial advisors to determine
4 which alternatives the debtors should pursue, including, among
5 others, seeking to foreclose on the collateral securing the
6 mortgage loan, seeking the appointment of one or more
7 receivers, or seeking relief to the extent that the debtors had
8 filed bankruptcy.

9 Mr. Lascher would testify that, in considering these
10 alternatives, the debtors' analysis included economic and
11 noneconomic factors, including the expected recovery, the cost
12 to pursue each of the alternatives, the timing of the potential
13 recoveries, and the likelihood of being able to achieve value
14 through each alternative. Additionally, he would testify that
15 the debtors considered the potential impact on the hotel
16 properties serving as collateral and the hotel franchise
17 agreement that support the value. After extensive negotiations
18 with Innkeepers and their legal and financial advisors, the
19 Court determined that the transactions described in the motion
20 are the best alternative to maximize recovery on the mortgage
21 loan.

22 Mr. Lascher would testify that on July 19 Innkeepers
23 filed for bankruptcy, and he would also testify that the
24 balance of the mortgage loan on the petition date was 220.2
25 million dollars, plus late fees and other charges pursuant to

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1 the documents, and that the loan is secured by approx -- by
2 twenty of the seventy-two hotels, going by Innkeepers and its
3 affiliates.

4 Mr. Lascher would testify that LCPI and Innkeepers
5 agreed to the terms of the restructuring embodied in the plan
6 term sheet, and that the restructuring contemplates the
7 debtors' agreement to convert a hundred percent of their debt
8 to equity, subject to dilution for management incentive, and a
9 provision of a debtor-in-possession financing to address
10 certain property improvement plans, work and certain other
11 necessary capital expenditures for the hotels that secure the
12 mortgage loan.

13 Mr. Lascher would further testify that LCPI's
14 willingness to enter into the plan support agreement is
15 conditioned on its ability to mitigate its risk by being able
16 to monetize a portion of the equity it receives in the Chapter
17 11 case, and that to that end, LCPI entered into a separate
18 agreement with Apollo to sell 50 percent of the equity, when
19 issued, for a price of 107.5 million dollars. Mr. Lascher
20 would testify that this amount is considered by both the
21 debtors, their financial advisors, to be adequate
22 consideration.

23 Mr. Lascher would further testify that although the
24 agreement with Apollo can be terminated by either Apollo or
25 LCPI under certain circumstances, the debtor further negotiated

1 a provision in the plan that provides that if the debtors are
2 unable to find a buyer for 50 percent of the equity they
3 received, for at least a 107.5 million dollars, they can
4 terminate the plan support agreement.

5 Mr. Lascher would further testify that a formal
6 auction at this stage would be both detrimental to both LCPI,
7 as LCPI currently has a purchaser for a hundred percent of the
8 equity for a significant cash payment, and there is no
9 assurance at this time that a transaction that provided LCPI
10 such similar value or better value could be structured,
11 following Innkeepers' plan process.

12 Mr. Lascher would testify that prior to LCPI's entry
13 into the agreement with Apollo, Lehman, through its financial
14 advisor, formally marketed the loans, and during this marketing
15 process, Lehman received expressions of interest from
16 approximately ten parties; signed confidentiality agreements
17 with five of these parties, which were allowed access to a data
18 room.

19 Mr. Lascher would testify that because of the mortgage
20 loan that was in default, and it was evident that Innkeepers
21 would likely seek Chapter 11 protection, Lehman was unable to
22 find a purchaser for the mortgage loan for adequate
23 consideration. Mr. Lascher would testify that Lehman has
24 received inquiries from other entities about purchasing the
25 mortgage loan -- about purchasing the equity received in

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1 exchange for the mortgage loan, but that none of the inquiries
2 has resulted in a formal offer.

3 Mr. Lascher would further testify that Appaloosa
4 itself contacted Lehman regarding the purchase of the equity
5 received on account of the mortgage loan, however, Appaloosa
6 did not submit a written offer, despite the request to do so.

7 Mr. Lascher would testify that prior to September 1st,
8 they can walk away from this transaction -- from the sale of
9 the equity, and that LCPI can always sell the mortgage loan, if
10 it determines that it can maximize value by doing that, at
11 which time, Innkeepers could terminate the plan support
12 agreement.

13 Additionally, Mr. Lascher would testify that the term
14 sheet and the plan support agreement provide that if this
15 direction is not finalized within the period set forth in the
16 plan support agreement, approximately 240 days, at Innkeepers'
17 option, either the collateral can be sold to a third party,
18 transferred to LCPI or allowed to fore -- LCIP will be allowed
19 to foreclose on the collateral.

20 Mr. Lascher would testify that the plan term sheet and
21 the plan support agreement is a result of extensive good-faith
22 negotiations between LCPI and Innkeepers, and their respective
23 counsels and financial advisors, and he believes that the
24 transaction set forth in the plan term sheet will maximize
25 LCPI's recovery. He would also testify that the provision of

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1 up to seventeen and a half million dollars to Solar, an LCPI
2 affiliate, so that they can extend the DIP loan, is a necessary
3 part of the transaction and it benefits LCPI by improving the
4 value of the collateral currently securing the mortgage loan.
5 Mr. Lascher would testify that the provision of the funds to
6 Solar is in the best interest of the LCPI estate.

7 Mr. Lascher would testify that in connection with
8 obtaining the records and internal approvals at Lehman, as is
9 customary, he and his team discussed the situation and proposed
10 transaction with the real estate investment committee. And the
11 transaction was approved by the real estate investment
12 committee, by Bryan Marsal and by the board of directors.

13 Mr. Lascher would testify that he has concluded in his
14 considered opinion that LCPI's entry into the plan support
15 agreement, which contemplates the conversion of the mortgage
16 loan to a hundred percent of the equity, the provision of
17 seventeen million dollars of the DIP -- seventeen and a half
18 million dollars of the DIP loan, and the sale of fifty percent
19 of the equity for not less than 107 million, is in the best
20 interests of the estate, and additionally, that entry into the
21 plan support agreement mitigates Lehman's -- LCPI's risks by
22 allowing them to exercise remedies, to the extent that the plan
23 cannot be consummated or is otherwise deferred.

24 And that's the conclusion of his testimony, Your
25 Honor.

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1 THE COURT: Is there any objection to the receipt of
2 that proffer? I can't tell if that's an objection or if it's a
3 reservation of rights.

4 MS. STRICKLAND: Your Honor, at this time, it's a
5 reservation of rights. But I would like to actually reserve
6 only for about fifteen minutes until the end. There was no
7 declaration filed by Mr. Lascher in connection with this
8 matter. The only declaration that was filed was in connection
9 with the Lazard matter. And so under 9014-2, this is not set
10 up to be evidentiary.

11 There are things that are included in the proffer that
12 are nowhere within the submissions that Lehman has made thus
13 far as to -- to give a specific example, the --

14 THE COURT: All I want to know is whether I can accept
15 the proffer. I understand the reservation.

16 MS. STRICKLAND: If you would reserve on that, Your
17 Honor, until the end of this matter. I may very well object to
18 it, yes.

19 THE COURT: Object in what respect? Are you going to
20 call a witness?

21 MS. STRICKLAND: I would have had the opportunity, had
22 I been apprised of the fact that this was going to be
23 evidentiary, under Rule 9014 --

24 THE COURT: This is simply evidentiary as to the
25 debtors' business judgment in the Lehman case. It has no

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1 evidentiary impact, as far as I'm concerned, in the case that
2 you're concerned with. And I have some fundamental questions
3 as to why you're here.

4 MS. STRICKLAND: Certainly, Your Honor.

5 THE COURT: And we're going to get to that when we get
6 to your objection. Right now, I accept your reservation of
7 rights, but I'm also accepting the proffer.

8 MS. STRICKLAND: Okay, Your Honor.

9 MR. PEREZ: Your Honor, I have nothing further.

10 THE COURT: Okay. I think I should hear from those
11 who support the motion first.

12 MR. O'DONNELL: Your Honor, Dennis O'Donnell; Milbank,
13 Tweed, Haley & McCloy on behalf of the official committee. At
14 the risk of sounding like a broken record, myself, Your Honor,
15 this is yet another situation where the committee was heavily
16 involved in the debtors' consideration of the proposed course
17 of action here and the relief being sought in the motion.

18 We have been fully apprised and involved in the
19 discussions for the past several months, and believe that under
20 all the circumstances, the relief being sought makes sense. It
21 is somewhat unusual. I'm not sure if it's quite -- not as
22 unusual as Mr. Perez suggests. But we believe that what is
23 really being presented or what is presented that is here, is a
24 package deal. I mean, the sale, in particular, which I think
25 is the issue most in contention, is part of an overall deal,

1 but cannot be considered separate from it.

2 And the committee and its advisors looked at the terms
3 of the proposed sale to Lazard and concur on the debtors'
4 judgment that the sale price, even in the absence of an auction
5 process, is reasonable.

6 THE COURT: You said Lazard. Do you mean Apollo?

7 MR. O'DONNELL: Apollo. My apologies, Your Honor.

8 We believe that the sale price is reasonable. I mean,
9 we believe that an auction -- that the sale can go forward here
10 without an auction at this point, because there is nothing to
11 sell at this point. Until events play out in the Innkeepers
12 case and Judge Chapman does whatever she's going to do in that
13 case, there is nothing for the debtors to sell here. And an
14 auction would make no sense.

15 And finally, Your Honor, in terms of potential impact
16 on that case, we really believe that the cart is being put
17 before the horse here. Whatever -- all the debtors are seeking
18 here is authority to go to Judge Chapman and participate in
19 that process. Judge Chapman will decide whatever she decides
20 in the Innkeepers case. What's before Your Honor today is
21 simply whether the debtors' decision to enter into the plan
22 support agreement, which includes the proposed sale to Apollo,
23 entails a sound exercise of their business judgment. And the
24 committee believes that it does.

25 THE COURT: All right. Are there any others who

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1 support this?

2 I'll hear the objection from Appaloosa. But before we
3 get to the merits, I'd like to talk about your standing. Why
4 are you here and what gives you a right to be here?

5 MS. STRICKLAND: Your Honor, just because I neglected
6 to do so earlier, Rachel Strickland of Willkie Farr &
7 Gallagher, on behalf of Appaloosa Investment.

8 Appaloosa purchased a significant portion of the
9 Bankhaus claim from Deutsche Bank on July 17th. July 17th is
10 important because it's a date that is prior to the time that
11 Appaloosa was even cognizant of the fact that Innkeepers would
12 be filing for Chapter 11. That claim was not acquired for
13 purposes of having a strategic position to implicate
14 Innkeepers.

15 I am here today as a result of the fact that they are
16 a substantial creditor of Lehman Commercial Paper, not in our
17 capacity as an interested party in Innkeepers, which we are.
18 And we have fully disclosed from the absolute outset, both to
19 the Lehman counsel when we were speaking to them and in our
20 initial objection, we definitely wear two hats. And I will not
21 be confusing those hats today. We may very well have a beef
22 down the hall but that's not for today and that's not for Your
23 Honor.

24 THE COURT: Yes, but your motivation here is not
25 really as a creditor of Lehman Commercial Paper. Your

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1 motivation here is as an active participant in a case down the
2 hall before Judge Chapman and that's why you're here. You
3 really can't credibly say that you're here as a creditor even
4 though you have creditor standing.

5 MS. STRICKLAND: I can absolutely credibly say, Your
6 Honor, that we are here as a creditor of Lehman Commercial
7 Paper.

8 THE COURT: I understand that you're here as a
9 creditor of Lehman Commercial Paper, but your motivation is as
10 a party-in-interest in the Innkeepers' case. That's clear to
11 me, and you can't deny that.

12 MS. STRICKLAND: I can deny that, Your Honor. There
13 are multiple --

14 THE COURT: You can't credibly deny that.

15 MS. STRICKLAND: I can --

16 THE COURT: Based upon the papers you filed you can't
17 credibly deny that. This is all about Apollo. Apollo is all
18 over your papers. Your papers are all about the Innkeepers
19 case. I'm going to give you an opportunity to say whatever you
20 want to say, but understand that you're arguing from a somewhat
21 difficult position.

22 MS. STRICKLAND: I appreciate that, Your Honor. Our
23 objection is simple. We don't believe that the debtors have
24 met their burden. Neither the motion nor the reply nor the
25 proffer that was just put in answers a few simple things that

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1 are required for any debtor moving under 363. They don't say
2 why the plan support agreement protects their collateral or
3 protects this estate against the investment it already has, nor
4 do they say that about the sale to Apollo. They have never
5 included in any presentation to this Court or in any pleading
6 why 107.5 million dollars is the right number.

7 Starting with the plan support agreement. They have
8 given a generic explanation. Their explanation is that they
9 need to protect their current investment and they need to avoid
10 a, quote, "freefall bankruptcy" in Innkeepers. There's no
11 evidence of any freefall bankruptcy risk in Innkeepers.
12 Innkeepers filed on July 19th. It is operating solely with
13 cash collateral. And there's not even a hearing in that case
14 on a DIP until September. There is no freefall filing.
15 There's nothing in the plan support agreement or in the sale to
16 Apollo, which all parties have said is outside of the
17 Innkeepers case entirely, that implicates or protects against
18 any kind of freefall. If those agreements were to disappear
19 today it wouldn't create a freefall.

20 The debtors' own papers in this case say that what
21 they need to do to protect their collateral is make sure that
22 the property improvements can be made and that those Marriot
23 flags stay up. We agree. But those property improvements are
24 dealt with by the DIP, and the DIP has no provisions that cross
25 over into the PSA or the Apollo sale. And the Marriot

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1 forbearance agreement, that protects Lehman's collateral and
2 keeps those flags, is conditioned only upon the DIP.

3 We're not objecting to the DIP. We think that that is
4 a sound exercise of business judgment, particularly because in
5 effect it's a rollup; that 17.5 million came out of the
6 original reserves and is going back in. We think that is
7 important to protect Lehman Commercial Paper's interest in the
8 Innkeepers case. But it has nothing to do with the plan
9 support agreement or the sale to Apollo. The PSA doesn't
10 accomplish that goal. It only binds one creditor of Innkeepers
11 in any of the cases, not just the twenty that Lehman is
12 implicated by. One. Lehman. No other creditor of the other
13 seventy-two debtors is bound by the PSA.

14 Why is Lehman locking itself up? There is already in
15 the Innkeepers case massive amounts of turmoil over what will
16 be valuation disputes before Judge Chapman. There is going to
17 be a deposition of a Lehman representative tomorrow. An
18 examiner motion has been filed in that case. The PSA is not a
19 device to expedite a recovery for Lehman in the Innkeepers
20 case. The PSA doesn't hasten Innkeepers' exit. It doesn't
21 lock other parties up and get everybody's ducks in a row to
22 facilitate a fast process. It only locks up Lehman. So why is
23 that good for Lehman? Nothing is going to happen to Lehman and
24 Lehman's interests if the PSA doesn't get done and if the sale
25 to Apollo doesn't get done.

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1 And that turns to the next component, the sale to
2 Apollo. The debtors have said five statements repeatedly in
3 their papers. The first one is that selling the stock now
4 mitigates the risk inherent in taking an equity position in
5 another debtor. The second is that they believe the price is
6 fair. Third, that they have not marketed the stock because
7 they can't market something they don't have. Four, they're
8 concerned if they wait they're going to lose their bird in the
9 hand which is Apollo. And five, that they're free to accept
10 another offer until September 1.

11 These five assertions, all of which were made without
12 any support, don't satisfy Lionel and the rest of the case law.
13 Judge Gerber recently referred to what is a routine showing
14 required of the debtor moving under 363 and not just in cases
15 where the sale of substantially all of the assets are
16 occurring.

17 And all of these cases repeat the same factors which I
18 know Your Honor is aware of. But there are four themes that
19 come across loud and clear in every case: sound business
20 purpose, adequate sales procedures, that the buyer is a good-
21 faith purchaser, and that the sale price is fair and
22 reasonable.

23 Of these points, the motion and their reply either
24 acknowledge that the factors have not been met at all -- sale
25 procedures, et cetera -- or are completely silent. The motion

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1 is silent as to how anyone arrived at 107.5 million dollars.

2 The motion acknowledges this asset hasn't been marketed. The
3 debtors have never discussed or given a probable range of the
4 value of the equity or the implications in the value of the
5 release being contemplated for Apollo.

6 The motion and the reply state repeatedly, and I heard
7 it again this morning, that the debtors seek the authority to
8 sell the equity for at least 107.5 million. That's not
9 consistent with the documentation. Paragraph 1 of the letter
10 agreement with Apollo is entitled "Binding Nature Definitive
11 Agreement".

12 If approved by Your Honor, this offer that is before
13 you today will not just be a floor on the value, it will also
14 be a ceiling. The debtors have said that they're concerned
15 that they're going to lose the opportunity to sell the equity
16 if they wait. This is just speculation. The party that they
17 have on the other end of this sale is the equity holder of
18 Innkeepers that has guaranteed Innkeepers' obligation. On the
19 other side of the pure speculation supported by nothing is the
20 common sense proposition that Apollo, who has more of an
21 interest in the Innkeepers cases than anyone else, is probably
22 going to be there at the end of the day when they're seeking to
23 sell that equity, if in fact they have equity at that point.

24 There's no evidence that Apollo is going anywhere or
25 that there's any time pressure on this. We're not suggesting

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1 that there may not be a time when they come to you and make the
2 case they're required to make under 363 and that Your Honor
3 should, solely looking at Lehman as Your Honor must do, say
4 this is a great deal for Lehman, I should approve it. But
5 today is not that day.

6 Lehman's arguments contradict themselves. On the one
7 hand, Lehman defends its lack of marketing by saying 'How can
8 we market what we don't have?' You're moving to sell what you
9 don't have today. They said 'You know, if we marketed this and
10 we had an auction, that could really hurt the Innkeepers
11 cases.' I'm not sure why. But they're putting a price tag on
12 it today, and there's no concern that that's going to hurt the
13 Innkeepers cases. And again, just wearing my Lehman hat, which
14 I get that Your Honor doesn't buy but I do in fact have one on
15 my head --

16 THE COURT: I don't see it yet.

17 MS. STRICKLAND: Okay.

18 THE COURT: I mean, I hear what you're saying, but one
19 of the questions I'm going to want you to answer that you
20 haven't answered, because I didn't ask it yet, I want a full
21 disclosure of your interest in the Innkeepers case. I want to
22 know what Appaloosa has in the case, what its objectives are in
23 the case, what its motives are in the case, because I believe
24 Appaloosa sent you here because of that case, not because of
25 this case.

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1 MS. STRICKLAND: Appaloosa has a substantial interest
2 in the Innkeepers case, particularly on the fixed side, which
3 is not the Lehman twenty hotel. It's the forty-five silo that
4 under the plan support agreement would be sufficiently -- would
5 be significantly haircut. Lehman -- I'm sorry, Appaloosa has
6 significant problems with the plan support agreement and
7 absolutely supports the opposition to the plan that Lehman and
8 Apollo and Innkeepers are proposing. No doubt about it.

9 THE COURT: So you're going to be standing up in Judge
10 Chapman's court opposing the plan that the plan support
11 agreement is designed to foster?

12 MS. STRICKLAND: Correct.

13 THE COURT: Okay.

14 MS. STRICKLAND: However, Appaloosa's investment in
15 Lehman Commercial Paper, which is a substantial investment, was
16 purchased before the link between Innkeepers and Lehman
17 Commercial Paper was on the radar. There was no Innkeepers
18 filing on the horizon at the time -- at least to parties like
19 my client who were outside of the negotiation circle which has
20 been going on for some time. This is a substantial claim.
21 This wasn't a claim that was purchased to -- and allowed me to
22 tell you with a straight face we have standing. This was an
23 investment in Lehman Commercial Paper.

24 And here today, their objection is look, maybe in
25 Lehman Commercial Paper they're getting an amazing deal and

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1 maybe the equity that they would be getting is worth way more
2 than the way it's currently valued and that would be terrific
3 for their Lehman position. And if that's the case then Lehman
4 can make the case why its deal is great for its estate and in
5 their Lehman capacity they would support that.

6 As evidence of that I'll point to the super underlying
7 text in the reply. I did have a conversation with counsel for
8 Lehman Commercial Paper to say, look, have you marketed this
9 equity you're selling to Apollo? I will tell you right now, we
10 are going to be opposing that. But if this deal went through
11 we very well might be interested. No one other than the
12 existing equity holder of Innkeepers has had any opportunity to
13 diligence anything or look at anything. And when we told them
14 affirmatively and up front what our role and our viewpoint was
15 in the other case, the conversation that we had was, 'I'm not
16 really sure how we could agree to sell it to you if you're
17 going to be fighting us down the hall.' And I understood that,
18 and that's the reason there's no formal offer.

19 So again, you know, this is a lar -- Appaloosa is a
20 large hedge fund. They obviously have a lot of different
21 positions, which we're being perfectly candid about, but at the
22 same time, if they're able to make an excellent investment on
23 the Lehman side, yeah, they would be interested in it. I fully
24 expect that if there were a marketing process here and there
25 was an opportunity for more than one party to be inside the

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1 tent they would show up and they would participate in that.
2 And so they can underline that sentence all they want; I agree
3 with it. There's not a shifting motive because they wear more
4 than one hat. There's not necessarily a lack of motivation
5 that is Lehman-oriented because they also have a motivation
6 that's Innkeepers motivated. They do have that motivation; I
7 would be lying if I told you they didn't. But they have one
8 here as well.

9 There's been no process, as I just alluded to. Even
10 the private sale cases which we've cited in our objection make
11 clear that where a debtor comes to a judge under 363 they say I
12 am selling it to Party X and not opening it up to a process
13 because I did that process already. I have pre-marketed this.
14 We tried. We heard just a moment ago they've been trying
15 something for nine months. Now it's time for them to fish or
16 cut bait. There's been none of that here. The conversations
17 that I had when looking into Appaloosa's own interest was 'Have
18 you talked to anybody? How do you know what this is worth
19 unless there's been any sort of process?'

20 They are not saying this is a melting ice cube. The
21 melting ice cube and the real emergency in terms of protecting
22 Lehman's collateral is keep those flags up, we agree, and make
23 sure that the property improvements can be done. Entirely
24 encapsulated in the 17.5 million dollar DIP facility which, as
25 I mentioned, is a rollup and not necessarily a use of new

1 capital.

2 They have said that they're going to -- by
3 prearranging half of the equity sale to Apollo, they're going
4 to mitigate their risk of receiving equity. I have no idea
5 what it means to mitigate a risk that you've created yourself.
6 Lehman actively negotiated to receive equity. If it only
7 wanted half, maybe -- and I wasn't in that tent -- it should
8 have negotiated to receive half. Maybe it should have
9 negotiated to receive cash or new debt or something else. It
10 is now saying, 'Well, gee, we've got a risk' -- their word --
11 'and now we need to mitigate the risk.' They negotiated to
12 receive equity. There is nothing in the record before you that
13 supports their business judgment in doing that.

14 Now, they've also said, which I thought was a little
15 bit cute, that this offer can be topped until September 1st.
16 There's no party other than Apollo, the only entity that
17 already has all of the information on these assets because it's
18 the current equity holder, that has been afforded any
19 opportunity to diligence it. And if notice of the ability to
20 top an offer is putting a sentence in a reply, I'm fairly
21 certain it's not and that more notice would be required if that
22 were going to actively be something that they were going to be
23 deeming subject to higher and better offers.

24 And they're right, it is more complicated by the fact
25 that they don't even have the equity yet and that the hearing

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1 to approve the assumption of a plan support agreement, when it
2 would just confuse things since they're talking about filing
3 the plan in two weeks, hasn't even happened. So it is hard to
4 market something they don't have. I agree with the phrase
5 "cart before the horse", I just think it applies to this.

6 There's no rush here. The documentation for the
7 entire transaction isn't done. For whatever reason, fully
8 intending to come before Your Honor today and seek approval of
9 it, the written agreement between Lehman and Apollo says that
10 they're not going to fully document their sale until September
11 2nd, one day after the Innkeepers' court hears what it's
12 hearing and several weeks after Your Honor is being asked to
13 approve it. Everything is a term sheet. The Innkeepers' plan
14 isn't done. The sale documents aren't done. There are lots
15 and lots of details that have yet to be worked out. I'm just
16 not sure why they're here today.

17 The motion and the form of proposed order, of course,
18 take this all into account. The revised order that was
19 submitted, on page 3, the second full paragraph, asks Your
20 Honor for authority to enter into any transaction contemplated
21 by the term sheets, including amendments that'll be made
22 without notice to Your Honor and parties-in-interest. It's a
23 blank check.

24 They are talking in the reply about how this is sort
25 of a de minimis asset and I think they were talking about

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1 percentages of one percent or under one percent to the estate.
2 But if you look at their motion that they filed the first time,
3 they said that this is one of the most significant sources of
4 recovery that the Lehman Commercial Paper estate has. And if
5 half of the equity is reasonable to sell for 107.5 million then
6 the full equity is 200 million. They've got already over a
7 quarter of a billion dollars invested in this. It's not
8 immaterial.

9 I understand that they're in a very unique position.
10 They have a lot of distressed real estate assets in a very
11 tough market and they have a strong desire to make lemonade out
12 of lemons. But they have legal standards as a Chapter 11
13 debtor; they're obligated to protect and conserve the debtors'
14 property. And the 345 analogy, which we made and think is an
15 effective analogy, is something that other courts have picked
16 up on in a 363 context.

17 There's a case that we cited in our papers, In re
18 Bakalis, 220 B.R. 525, that when analyzing a 363 motion the
19 Court said that -- it was a context of a bid in an auction
20 where the debtor sought to take the lower bid because it had
21 fewer contingencies, and in that case the Court said that in
22 citing 345 that a trustee has to also seek to avoid undue risk
23 where dealing with money of the estate, and refers to trust
24 provisions and says a trustee who has a duty to preserve the
25 estate must use caution that may be greater than that of a

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1 prudent man who's dealing with his own property.

2 My client is a hedge fund. Lehman Commercial Paper is
3 not. So although there seems to be a lot of playing the
4 market, here that may very well be a prudent course of action
5 but it hasn't been demonstrated. There's no evidence, and Your
6 Honor, under Lionel, needs evidence that supports the business
7 judgment on all of the factors that we see in all of these
8 cases.

9 I am not asking Your Honor to block a plan in the
10 Innkeepers case. I am not asking Your Honor to substitute
11 Appaloosa's business judgment for Lehman's. If we have
12 concerns, and we do, we will take them down the hall. But
13 before Your Honor we do not believe that you have a sufficient
14 record.

15 If you conclude that 107.5 is an appropriate price for
16 fifty percent of the reorganized Innkeepers' equity -- not just
17 a floor but also a ceiling -- Your Honor is ruling that that
18 price is reasonable for fifty percent of another debtor's
19 equity. It's hard for me to understand how that isn't
20 something that someone is later going to say to Judge Chapman
21 this is at least probative. And we don't think that that is an
22 appropriate use of the courts. Common sense dictates that that
23 is something that is very likely to happen.

24 We support Lehman's DIP. We support the preservation
25 of the collateral. We do not think that the plan support

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1 agreement has had an adequate showing, and we certainly do not
2 think that the sale to Apollo at a specific price now has had
3 any sufficient showing as to the reasonableness of the price,
4 the need for the timing, and why all of these things have to go
5 before all of these things are determined. Once Lehman knows
6 what it's going to get -- and it can pursue and support lots of
7 things, but if something new crops up two weeks from now that's
8 a more interesting opportunity, Lehman can't avail itself of
9 it, and it's the only party that will be prohibited from doing
10 so.

11 So we do have an interest down the hall, we're going
12 to be speaking to that, but we very much have an interest here.
13 And if they come back and they make their showing under 363 as
14 to why what they're asking you to do is reasonable and why it's
15 good for Lehman, Appaloosa will be thrilled on the return on
16 its investment in this case as a result.

17 Unless Your Honor has other questions, that's all I
18 have.

19 THE COURT: Not right now.

20 MS. STRICKLAND: Thank you, Your Honor.

21 MR. PEREZ: Your Honor, Alfredo Perez. While counsel
22 says that they're not trying to substitute their business
23 judgment, they are in fact trying to substitute their business
24 judgment, Your Honor. And you know, they make reference to
25 Lyondell (sic) repeatedly. Well, Lyondell (sic), the reason in

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1 Lyondell (sic) was because --

2 THE COURT: Lionel.

3 MR. PEREZ: Lion -- oh, God, Lionel, thank you for
4 doing that. The only articulated reason in Lionel was because
5 the creditors' committee wanted to settle. That was the only
6 articulated reason. Yet I think counsel has articulated five
7 reasons why we want to do the transactions: One, we want to
8 monetize the equity that we're receiving. Two, we do think
9 it's a fair price; we've said it. Three, we don't know what
10 the process is going to be like; we can't sell something that
11 we don't have. Four, it is a bird in hand and we don't know
12 what's going to happen in the future. Five, it is a
13 substantial price.

14 And Your Honor, we can sell it to anybody before
15 September 1st and at any time we're free to sell our mortgage
16 loan. So if somebody wants to come and pay us for our mortgage
17 loan there's nothing that prevents us from selling the mortgage
18 loan. Innkeepers would then have to -- would have the right to
19 walk away from the PSA, but there's nothing that prevents us
20 from selling it.

21 Your Honor, we do believe that this is an effort, that
22 restructuring it, that doing the DIP loan, and that being able
23 to monetize our recovery are -- is protecting our collateral.
24 I mean, we're doing this -- I mean, this is what people want
25 you to do. They want you to have a plan. They want you to

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1 monetize collateral. They want you to be in a situation. And
2 the fact that they say, well, we're the only creditor that's
3 done anything, okay, so we're the only creditor that's done
4 anything.

5 And again, I didn't know what Appaloosa's interest was
6 in the Innkeepers case; I suspected that they were a holder of
7 some of the CMBS paper. But the interests of Lehman and the
8 interests of the holders of the CMBS papers are going to be
9 diametrically opposed. I mean, there's no question about that.
10 It's a zero-sum game. To the extent they get a dollar more our
11 estate gets a dollar less. Zero-sum game. So we should keep
12 that in mind.

13 Your Honor, we do think we have met our burden under
14 Lionel. We have articulated reasons why we want to do this.
15 This is not -- you know, we've presented a package which we
16 think in our interests maximizes the recovery for our estate.
17 They may not like it. They may think that if we wait we may
18 get more. It's our business judgment that that's not the case.
19 I think it's supported by the committee. And we did try to
20 market what we had and we couldn't market what we had.

21 Thank you, Your Honor.

22 THE COURT: Before you sit down --

23 MR. PEREZ: Yes, sir.

24 THE COURT: One of the things about this particular
25 argument that distinguishes it from other items on today's

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1 calendar is that it's my impression that the timing of this
2 motion is driven not by Lehman's true needs but by the needs of
3 others in the Innkeepers case and in particular the needs of
4 Apollo. I'm saying that's my impression.

5 I know that there's a hearing which is scheduled on
6 September 1 before Judge Chapman. I know, because I've looked
7 at it, that that's likely to be a big deal hearing where
8 there's a motion that has been brought by Dewey & LeBoeuf for
9 appointment of an examiner, that the focus of the examiner
10 motion is the role of Apollo, and that there's a big fight
11 brewing in that case.

12 Ms. Strickland has tried to make her appearance here
13 appear, to the best of her ability, to be that of a Lehman
14 creditor, but I believe that transparently she is here and
15 she's being paid to be here not because of Appaloosa's claim in
16 this case but because of Appaloosa's interests in the
17 Innkeepers case. That makes good sense to me because if she
18 can head this off at this pass that's one advantage for
19 Appaloosa in the next case.

20 That having been said, what's the consequence to
21 Lehman? And I recognize that Lehman ALI is involved in this
22 too and I'd like to hear from Lehman ALI's counsel, to the
23 extent that Lehman ALI's counsel is prepared to speak to why
24 this is a good deal for Lehman ALI. What's the consequence if
25 this isn't approved today?

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1 MR. PEREZ: Well, Your Honor --

2 THE COURT: What's the consequence if this is deferred
3 until after the hearings that are scheduled to take place in a
4 few weeks? Is the cart before the horse? And is Lehman doing
5 the bidding of others here?

6 MR. PEREZ: Your Honor, I don't believe so. I do not
7 believe that it's doing the bidding of others at all. Your
8 Honor, the motion -- this filed on July 19th. At the first-day
9 hearings it was discussed with Judge Chapman that Lehman would
10 be filing a motion to approve the plan support agreement which
11 would then be heard, and then the motion to approve the -- to
12 assume the plan support agreement in the Innkeepers case
13 would be heard after this Court had an opportunity to rule on
14 it.

15 Your Honor, Apollo is represented by Paul Weiss.
16 Innkeepers is represented by Mr. Basta. They've been
17 functioning, based on what my involvement is -- have been
18 relatively independently. Your Honor, this is not something --
19 we've put this on full notice. This is not something that
20 we're doing kind of on a hurry up basis. And I don't believe
21 we're doing anybody's bidding. I do think that our ability to
22 credibly stand in front of Judge Chapman and support the
23 assumption of the plan support agreement will inure to our
24 benefit.

25 And I don't think that this is done -- and I do

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1 believe, Your Honor, that waiting to support this is going to
2 cast a doubt. I frankly believe, unfortunately, that if we
3 wait it's almost tantamount to not having had it approved
4 because at that point we'll be in a situation where we'll have,
5 you know, courts that are going to need the approval, one who
6 will need the approval of the other. Judge Chapman is going to
7 have to decide whether she approves the assumption, whether she
8 appoints an examiner, all of the things that she's going to
9 have to do. And all we want to be able to do is be there to
10 say to the extent that the Court approves this we can go
11 forward. And that's really all we're asking. And it's
12 actually the horse. I mean, we're -- this is the horse, it's
13 not the cart, Your Honor.

14 THE COURT: Okay. Well, enough imagery on that, but
15 it's clear that approval of the plan support agreement here is
16 simply one of the puzzle pieces that isn't even the most
17 important puzzle piece because the plan support agreement is
18 tied to what happens before Judge Chapman later.

19 MR. PEREZ: What happens before Judge Chapman, whether
20 the plan -- whether the plan support agreement is assumed, what
21 happens before Judge Chapman when she determines value of the
22 assets, and what happens before Judge Chapman when there is a
23 hearing on confirmation.

24 THE COURT: What I'd like to hear some more about are
25 the flexibilities available to Lehman Commercial Paper,

1 assuming this is approved. Ms. Strickland argues strenuously
2 that the 363 standards are not met here, in part because for
3 all practical purposes Lehman is locking into a transaction
4 that's a black box, it's blind, because we can't really tell
5 what this asset would be worth in a free market environment,
6 one in which, say, Appaloosa or others like Appaloosa might be
7 a bidder, or there's an opportunity down the road in an
8 unlocked up bankruptcy case for valuation to be tested in what
9 may be an improving market for hotel properties. I'm putting
10 those words out as my own words. Those aren't words that she
11 said, but that's the concept.

12 And I don't have a 363 problem if Lehman has
13 flexibility, but if Lehman is in fact boxed by this trustee I
14 might. And to the extent that she has raised record questions
15 as to the adequacy of the record to support this, we may need
16 to further develop that record.

17 MR. PEREZ: Right, Your Honor. And I believe that the
18 two pieces of evidence which are in the record are that between
19 now and September 1st we can totally walk the deal with Apollo,
20 and that at any time we can always sell our mortgage loan to
21 the extent that there's a higher bidder for it. So --

22 THE COURT: But you have -- to what extent has this
23 transaction determined equity value in respect of a plan of
24 reorganization that hasn't yet been filed with respect to a
25 confirmation hearing that hasn't yet been scheduled?

1 MR. PEREZ: Your Honor, I don't think it's determined
2 it at all. I don't think it's determined it at all. What we
3 have done is we have a -- assets that are currently owned by
4 Innkeepers. We are getting 100 percent of the equity, assuming
5 all of these other things fall into place. And we're -- today
6 we're trying to mitigate the risk of that 100 percent by a cash
7 payment of 107 million dollars. You know, our outstandings are
8 220. So we're mitigating by a cash payment of 107 million
9 dollars. Depending on what the capital structure looks like,
10 depending on a whole host of other things, the Court's going to
11 have to make a determination of value.

12 And Your Honor, I mean, this is really a situation
13 where we are asking permission ahead of time because we don't
14 want to find ourselves in the problem that we found ourselves
15 in some other cases. I mean, Judge Chapman is going to be free
16 to say I'm not going to approve the plan support agreement.
17 Judge Chapman is going to be free to say, you know, we're not
18 going to impair the CMBS creditors, to the extent that you need
19 to be impaired in order to do it.

20 Now, the black box comment, I also don't believe is
21 accurate. There are three pieces in here that I think are
22 significantly determined that can't move unless we come back to
23 you. And that is 100 percent of the equity, and we have to be
24 able to monetize half of that for 107 with Apollo or a greater
25 amount if somebody comes along and gives us more, and funding

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1 no more than 17.5 million. And you can't -- you can't look at
2 the funding separately from all of the other things, Your
3 Honor. And it's not really a black box. Yes, there is going
4 to be a process that's going to be run, but we've staked
5 three -- you know, this is a chair that has three legs. If you
6 knock out any one of those three legs we're back in front of
7 you, Your Honor.

8 So I don't believe that -- and with respect to the
9 marketing process, I mean, they did go out and market our loan.
10 Okay? This is not something that -- we marketed the loan to
11 see what we could get for the mortgage loan of Innkeepers. And
12 there was nothing that was satisfactory. So we entered into
13 these discussions and we did this.

14 So I really do not believe, Your Honor, that this
15 Court is in any way determining what Judge Chapman is going to
16 do or not do, but she's going to be able to do what she does,
17 recognizing that we're not going to have to come back here for
18 the Court, you know, to then go back and forth between the
19 judges.

20 THE COURT: Okay. Are you satisfied at this point
21 that the declaration that you read into the record of Michael
22 Lascher is all the evidence that you need to support your
23 motion for today?

24 MR. PEREZ: Your Honor, unless the Court has any
25 questions, I think I am. I mean, we -- I think we've

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1 established what we need to establish in order to prove the
2 business justification for doing the transaction which is a
3 holistic transaction, it's not just the ultimate sale.

4 THE COURT: Okay. Is there anyone else who wishes to
5 speak in support of the motion?

6 (No response)

7 THE COURT: I invited counsel for Lehman ALI to speak
8 to the motion. I don't know if there's a desire to speak to it
9 or not.

10 MR. SAGE: Your Honor, Michael Sage from Dechert, on
11 behalf of Lehman ALI. I would just like to reiterate a few
12 points made by Mr. Perez, just a few.

13 Your Honor asked the question about whether this was
14 driven by Apollo. And I think it's a good question. The
15 answer is: absolutely not. Any situation in which a creditor
16 has an agreement with a debtor and it's a pre-negotiated deal,
17 it behooves that creditor to work out a pre-negotiated assumed
18 deal in the case.

19 And therefore, regardless of what Apollo wanted, it
20 was in Lehman's interest to have a plan support agreement, a
21 process, and a pathway through Chapter 11. And that's what was
22 going on in this case. That Apollo wanted what it wanted is
23 immaterial to that point, meaning that we felt that in the
24 Innkeepers bankruptcy it would be our interest to have a
25 roadmap to success and to a good result. That's why we are

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1 here before the Court today, as Mr. Perez said, to have pre-
2 approval at certain levels. And that's why down the hall we
3 have hopefully a plan support agreement that will be approved
4 in that case.

5 It was stated earlier by Ms. Strickland that, you
6 know, without this deal we would not have -- that there's no
7 evidence or there's no inclination or there's no suggestion
8 that we would have a freefall in that case. I think that's
9 almost ridiculous because in fact if we didn't have a
10 pre-negotiated deal with the company we don't know what would
11 happen in that case. We have no idea whatsoever.

12 In fact, Midland and other creditors in that case find
13 themselves without a pre-negotiated deal, find themselves in
14 exactly the position that we don't want to be in. We want to
15 be in a position of having a negotiated transaction, a roadmap,
16 a path toward success for Lehman in that case. That's why we
17 are here and that's why we'll be there. All right? It's an
18 effort to try to make sense of the case and try to mitigate the
19 risk. So just in response to what she said about, you know,
20 there's no suggestion that it would be a freefall there as to
21 us, I think it would be a freefall there as to us without a
22 plan support agreement.

23 Now, would we try to negotiate, try to make something
24 better of it, try to deal with that fact if it's not approved
25 there? Of course we will. That's what we'll do. But this is

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1 an attempt to avoid that risk. She also said --

2 THE COURT: How am I -- excuse me, Mr. Sage. How am I
3 to determine the reasonableness of the monetary value that has
4 been ascribed to Lehman's fifty percent share of the equity
5 that will come out of the plan assuming it's confirmed?

6 MR. SAGE: Well, before I address that squarely, I
7 want to point out --

8 THE COURT: It may be tough to address squarely.

9 MR. SAGE: Well, I think that Lehman has made -- I'm
10 going to come back to it in one second --

11 THE COURT: Okay.

12 MR. SAGE: -- if I can. I just want to say before I
13 answer it squarely, or as best I can, is that the point that
14 Mr. Perez made about being able to sell the loan is critical
15 because, you know, it's not the case that Lehman is locked in
16 forever or past September 1st, assuming we get past the out
17 period, to transfer the equity when received to Apollo. That's
18 just not the case.

19 If Lehman sells the note to a third party, Appaloosa
20 or anyone else in the world, the plan support -- the agreement
21 with Apollo goes away, the plan support agreement goes away at
22 the debtors' option. The debtor can choose to do a deal with
23 who -- who we sell to. But it's critical, I think, that from
24 the Lehman perspective that we can always monetize or always
25 get out of the case, the Innkeepers case, by selling the loan.

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1 That's some -- you can't just gloss over that. I would
2 understand -- if that wasn't the case I would understand the
3 objection a lot more.

4 With respect to how Lehman got there, Lehman got
5 there, you know, by taking into account the process -- the
6 attempt to sell the loan by using their experience in these
7 areas, by conferring with their financial advisor, and by
8 negotiating what they thought was the best price with a willing
9 buyer, Apollo.

10 It was -- you know, there wasn't -- it's correct,
11 there wasn't a formal auction process. I don't -- I submit
12 there doesn't need to be, given the overall facts of this case.
13 But they did -- it wasn't just a number they picked out of the
14 air either. It was a number that was based on all of the facts
15 and the experience of Mr. Lascher who's in the court today, to
16 make a determination that it was a reasonable price.

17 The other thing I'll say is that, you know, it's easy
18 to say, well, why not just have an auction in ten months or
19 whenever you're going to get the asset? Who knows what's going
20 to be in the world in ten months? If indeed the Apollo deal
21 sticks and if indeed they don't sell the note, if indeed they
22 find themselves holding the equity in ten -- in eight months,
23 six months, whatever the period is, you know, we don't know
24 what's going to be. It might be that the world looks a lot
25 different then, that it looks like a great price. It may look

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1 like a not great price. But that's the nature of making a
2 business judgment six months, eight months out; you take a
3 chance.

4 And you know, there is -- that's a business -- I
5 submit that's something that Lehman has the right to do in its
6 business judgment and it made what it considers to be the wise
7 move. Time will tell as to whether -- and time might not tell
8 that because if it looks to Lehman that there's either
9 execution risk, there's price risk or there's some other good
10 reason to sell the loan in three months they can do that too.
11 So they're not so locked in. They have options.

12 You know, as to whether this is probative to what
13 happens down the hall, I think that's -- it's a big statement
14 to make. You know, this is negotiated price. Judge Chapman
15 will run her case as she runs her case. If she takes notice of
16 what happens here that's her call. But she can take notice of
17 a lot of things and make a determination as to value, and I
18 don't think she will feel boxed, she shouldn't feel boxed. I'm
19 going to say on the record that she should not feel boxed or
20 limited by whatever happens here.

21 This, as Mr. Perez has correctly said, gives Lehman
22 the ability to take certain steps as long as certain minimums
23 are met. It's not -- it doesn't drive the outcome or the
24 result. And we're not looking to -- we'll not be in that
25 courtroom down the hall ever saying 'Well, based on Judge

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1 Peck's decision today you have to -- this means the value is
2 X.' That's not going to ever happen. That's not the goal.
3 Thank you, Your Honor.

4 THE COURT: Thank you, Mr. Sage.

5 MR. PEREZ: Your Honor, just one thing. Attached as
6 Exhibit B was our plan term sheet. And the plan term sheet on
7 page 7, 8, and 9 have the various termination events associated
8 with the plan support agreement. I think those termination
9 events, you know, set milestones in that case which give --
10 give us tremendous flexibility. You know, we've been focusing
11 only --

12 THE COURT: Could you put those on the record now?

13 MR. PEREZ: Yes, Your Honor. Would you like a copy of
14 the Exhibit B?

15 THE COURT: No, I just want you to put them on the
16 record now.

17 MR. PEREZ: Okay. All right. Well, in Exhibit B to
18 the motion, the plan term sheet, and the -- Lehman could
19 terminate the plan term sheet for the failure to meet any of
20 the milestones which would be:

21 There's no order authorizing assumption of the PSA
22 later than forty-five days after the petition date;

23 There is no order authorizing the DIP facility, for
24 both the fixed rate DIP and the floating DIP, within forty-five
25 days after the petition date;

1 The plan and disclosure statement, consistent with the
2 terms of the plan -- of the term sheet are not filed within
3 forty-five dates of the petition date;

4 The disclosure statement is not approved within 120
5 days of the petition date;

6 Lehman and the company haven't reached mutual
7 agreement with respect to the sales process, because it's
8 anticipated that there would be a sales process down the road
9 within 120 days;

10 An order confirming the plan is not approved within
11 240 days of the petition date;

12 The effective date of the plan is not -- goes
13 effective within 270 days of the petition date.

14 And so those are the milestones.

15 And in addition to that, Lehman has not executed a
16 definitive agreement with respect to the sale of fifty percent
17 of the equity for at least 107.5 million dollars by forty-five
18 days of the petition date. And obviously that's not to Apollo,
19 it's just 107.5 million;

20 Lehman has not consummated the new equity sale by 270
21 days after the petition date;

22 The Court does not enter an interim order on the use
23 of cash collateral in form and substance satisfactory to
24 Lehman;

25 The Court grants an order of relief to the automatic

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1 stay with respect to the other assets in the case;

2 The filing of the company of a motion to dismiss the
3 Chapter 11 cases or to convert the Chapter 11 cases;

4 The filing of the company of a motion that requests
5 relief and extension of the plan milestones or any alteration
6 of the remedies;

7 And upon the entry of an order converting the case to
8 a Chapter 7 or appointing a trustee;

9 The withdrawal amendment modification of the company
10 or the filing of the company of a pleading seeking to amend or
11 modify the plan or the PSA that's not satisfactory to Lehman;

12 The filing of a motion to approve disclosure statement
13 that contains pro forma capital structure that is not
14 consistent with the terms of the term sheet;

15 The granting of bankruptcy court relief inconsistent
16 with the terms of the plan in material respects;

17 The issuance by governmental authority or other
18 regulatory authority of competent jurisdiction of a ruling that
19 make it illegal or denies the ability to enter into the
20 transaction;

21 The existence of an event of default under the DIP;

22 The occurrence of an event of default under Lehman's
23 use of cash collateral;

24 After the execution of the PSA, a change in material
25 adverse effect on the use, value, or condition of the company,

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1 its assets or legal or financial status or business operations
2 of the company or a material disruption or a material adverse
3 change in the financial, real estate, banking or capital
4 markets;

5 Lehman determines, in its sole discretion, after
6 completion of tax due diligence that the transaction cannot be
7 structured in a way acceptable to Lehman. If it doesn't do
8 that within forty-five days a material breach of anybody of any
9 of the undertakings under the PSA.

10 And what we really haven't highlighted is that if the
11 Court grants it and then -- and it's assumed under Judge
12 Chapman's order, then if the plan isn't confirmed within 240
13 days, at that time Innkeepers has agreed to work with Lehman in
14 order to realize on its collateral. So the collateral will
15 either be sold, Lehman will be able to foreclose, or the assets
16 will be conveyed to Lehman. So to the extent that the process
17 continues for, you know, eight months and nothing happens, we
18 will have certainly -- we will be able to realize on our
19 collateral at that time.

20 So Your Honor, first we had the marketing process
21 ahead of time which didn't bear fruit. Now we've entered into
22 the agreement. I think there are significant protections for
23 the debtor on the agreement going forward. Hopefully we'll be
24 able reorganize and get 107 million dollars, have fifty percent
25 of the equity and be able to sell that equity in the time frame

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1 of the plan. But if that doesn't happen then we're set up to
2 realize on our collateral.

3 THE COURT: Okay, thank you.

4 MR. PEREZ: Your Honor, I would just -- I don't know
5 if we need to move the exhibit into evidence. It's attached as
6 one of the --

7 THE COURT: There's no need to. It's part of the
8 record. I wanted it read because I wanted the transcript to
9 include the various outs that relate to the plan support
10 agreement. This is a highly unusual motion, largely because
11 even though it is a motion that reflects the business judgment
12 of Lehman Commercial Paper, it fundamentally relates to the
13 role of Lehman Commercial Paper and its nondebtor affiliate,
14 Lehman ALI in another bankruptcy case, and the document which
15 I'm being asked to approve has much greater significance in
16 that case than it has in this case. We could argue about the
17 relative importance of 107.5 million dollar transaction in the
18 context of the billions that we deal with in the context of the
19 Lehman bankruptcy case, but it's clearly a significant amount
20 of money regardless of percentages that might be applied.

21 I am satisfied, based upon the argument of counsel,
22 the declaration of Mr. Lascher, the presentation made by Mr.
23 Sage on behalf of Lehman ALI, the support for this transaction
24 by counsel for the creditors' committee, and the abundant
25 number of outs just described by Mr. Perez, that this is not

1 only a transaction which is reasonable in the business judgment
2 of Lehman Commercial Paper but is one that is so highly
3 contingent that it is difficult to apply the case law standards
4 that have been cited by Ms. Strickland in her opposition to
5 this motion. This is a 363 transaction; of that there is no
6 doubt. But it is not a sale of substantially all of the assets
7 of Lehman Commercial Paper, nor does it come close to that.
8 Indeed, it is barely a sale at all. It is, instead, approval
9 of an agreement which is highly contingent and subject,
10 ultimately, to the judgment of my colleague, Judge Chapman, as
11 well as to the vagaries of the Innkeepers bankruptcy case
12 itself, the future course of which is unpredictable.

13 Whether or not this is the best deal that could have
14 been arrived at in the context of what amounts to a pre-
15 negotiated filing of a bankruptcy case that includes elements
16 that I don't know about and frankly -- I have enough on my own
17 docket -- I don't choose to know about unless I need to, this
18 is a transaction that I accept represents a reasonable collar
19 around the recoveries for Lehman in respect of its loans made
20 in the Innkeepers bankruptcy. Whether or not that turns out to
21 be a 107.5 million dollar outcome or some other outcome, I
22 don't know, the fact that Lehman retains the ability to
23 transfer in its sole discretion the mortgage loans that are at
24 issue here is a source of additional comfort to the Court.

25 And with all respect to the argument that has been

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1 made by Appaloosa and the standing issue that we were dancing
2 around during the course of that argument, it is manifestly
3 clear to the Court that Appaloosa's motivation in being here is
4 not in its capacity as a creditor of Lehman Commercial Paper
5 but is in its capacity as a significant party-in-interest in
6 the Innkeepers case. Its unabashed desire is to defeat the
7 plan support agreement either in this court or next door. And
8 it will have that opportunity another day.

9 The motion is approved.

10 MR. PEREZ: Thank you, Your Honor. I believe the rest
11 of the matters are being handled by Jones Day -- or, actually,
12 I'm not sure they're all Jones Day. The next matter is the --
13 oh, we reported on the SunCal matter, so the next matter --

14 THE COURT: Oh, one thing. One thing before we go to
15 the next matter. It's twenty-five to 1, or actually, twenty to
16 1 based upon that clock. And I've been sitting here and
17 everybody else has been patiently watching since about 10, and
18 for some of you, it's been since before 10. I need to know
19 whether or not the next matters to be heard are going to be
20 time-consuming. If they're going to be time-consuming, we
21 should take a lunch break. If not, hopefully we can just
22 dispose of them.

23 MR. TAMBE: Good morning, Your Honor. Jay Tambe from
24 Jones Day here to address item number 7 on the docket. We
25 think it will be relatively short; should be no more than five

1 to ten minutes.

2 THE COURT: Okay, Mr. Bartner (ph.) nodded in assent
3 to that, at least as to his piece of it.

4 And anybody who wants to be excused can be excused.

5 MR. PEREZ: And then, Your Honor, the matter 8, it's
6 about fifteen minutes. And that's -- Kasowitz is handling that
7 matter 8.

8 THE COURT: Okay, the Och-Ziff matter, we will handle
9 after lunch. And it's really more of a litigation matter,
10 anyway.

11 UNIDENTIFIED SPEAKER: Your Honor, may we be excused?

12 THE COURT: Yes. Everybody who wants to be excused
13 may be excused. And Och-Ziff will be at 2 o'clock.

14 MR. TAMBE: Good morning, Your Honor. Jay Tambe from
15 Jones Day on behalf of the debtors LBHI and LBSF with respect
16 to item number 7 on this morning's docket. This is a motion to
17 consolidate, and it's a motion to consolidate two adversary
18 proceedings with an objection, with a claim objection. Since
19 the time this motion was filed, there have been some
20 developments, and I will apprise the Court of those
21 developments and briefly touch upon the reasons why we believe
22 consolidation is proper here.

23 When we originally filed the motion, we had filed an
24 adversary complaint against Nomura International. We'd filed
25 an adversary complaint against Nomura Securities, and we had

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1 filed a claim objection with respect to Nomura GFP -- Global
2 Financial Products.

3 Nomura International and Nomura Securities consented
4 to consolidation for pre-trial purposes. All the parties
5 reserved their rights to argue and present to the Court at
6 another time whether consolidation is proper for evidentiary
7 hearing and trial purposes. And what we would propose with
8 respect to GFP is a similar consolidation order which is
9 consolidation for pre-trial purposes and leave for another day
10 and reserve all of our respective rights as to whether there
11 should be any consolidation of the evidentiary hearing.

12 Briefly, there are any number of common issues that
13 cut across all three of these matters. They all relate to
14 terminated derivatives transactions. So in each case, there's
15 a master agreement; in each case, that master agreement had an
16 automatic termination provision. So the filing of bankruptcy
17 by LBHI triggered the automatic termination of the master
18 agreement with respect to each of these Nomura entities. Prior
19 to the bankruptcy filing, each of these Nomura entities had
20 calculated their exposure to Lehman. Each of them have
21 calculated a substantial exposure in Lehman's favor. Following
22 bankruptcy, each of these Nomura entities submitted claims
23 forms and calculations of amounts owing upon termination which
24 were hundreds of millions of dollars the other way. The total
25 swing in valuation from pre-bankruptcy to post-bankruptcy is in

1 excess of a billion dollars.

2 We have laid out in the complaints, in the claim
3 objection, as well as in the consolidation motion the
4 similarities we see in the approach taken by all three of the
5 Nomura entities to how they have calculated termination values,
6 how they have gone about a blind bid ask spreads, we believe
7 those are common issues of law, common issues of fact that cut
8 across all three matters. That alone, I think, is enough to
9 support consolidation.

10 While we've been waiting to present this motion to
11 Your Honor, we have gone ahead and started on parallel tracks,
12 for now, with similar discovery schedules, similar protective
13 orders, similar expert discovery stipulations. Clearly,
14 consolidation would alleviate the burden of having to run on
15 parallel tracks. We could have one protective order; we could
16 have one discovery schedule; we could have one set of
17 deposition notices. And when we get to it, we would have one
18 set of dispositive motions that each side may wish to make.
19 And rulings entered by this Court would apply equally to all
20 three matters.

21 By no means are we suggesting that all issues are
22 common. We recognize that there are unique issues that pertain
23 to some of these master agreements, but that's not a reason to
24 deny consolidation. We certainly respect the uniqueness of any
25 factual legal arguments one of the Nomura entities may plan to

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1 make. We'd certainly preserve for that in any order that was
2 entered and any application we made to Your Honor.

3 We think consolidation is proper. The standards of
4 consolidation are met, here. Frankly, we're puzzled why, given
5 that we are already on parallel tracks on discovery -- we have
6 entered into discovery schedules with each of the Nomura
7 entities that are exactly the same; same amount of time fact
8 discovery, same amount of time for depositions, expert
9 discovery -- why Nomura GFP persists in objecting to
10 consolidation. And it's consolidation purely for pre-trial
11 purposes.

12 We would ask that the objection be denied and
13 consolidation ordered.

14 THE COURT: Okay.

15 MR. NOH: Your Honor, for the record, Solomon Noh from
16 Shearman & Sterling on behalf of Nomura Global Financial
17 Products. We refer to the entity as NGFP. Your Honor, at the
18 outset, I just want to remark to the Court, we're obviously
19 aware of the extraordinary burden -- administrative burden on
20 this Court as a result of all these extraordinary cases, and we
21 will endeavor to do our very best to make this an efficient
22 process. In fact, as Mr. Tambe has mentioned, we've gone so
23 far in making this an efficient process that we're quite unsure
24 exactly what we're doing here. Is -- the reason for the
25 adjournment to the consolidation hearing was that NGFP has been

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1 in constant discussions, settlement discussions with Lehman,
2 and to -- in an effort to promote good will, we have kept on
3 adjourning the hearing.

4 In the meantime, as Mr. --

5 THE COURT: When you say settlement discussions, do
6 you mean discussions that go to the merits of this dispute or
7 discussions that go to whether or not we can avoid dealing with
8 the procedural question that's presently before me?

9 MR. NOH: It goes to the merits of the dispute, Your
10 Honor.

11 THE COURT: Good.

12 MR. NOH: In the process, while the consolidation
13 hearing has been adjourned, we've progressed substantially with
14 the claims objection. As Mr. Tambe mentioned, we've entered
15 into a consensual form of litigation schedule which is
16 substantially identical to the one that's been entered with
17 respect to the adversary proceedings. Moreover, today, I
18 understand that there's anticipated to be delivered to the
19 Court a consensual form of protective orders. So with those
20 two elements, we're quite unsure what it means to consolidate
21 for pre-trial purposes only to the adversary proceedings that
22 also are pre-trial purposes-only consolidated. And what
23 concerns us, as well as our client, is we don't know what that
24 means. There is an element of unknown that nobody can really
25 articulate to us that we're afraid that this consolidation

1 order is going to cover.

2 Now, Mr. Tambe had briefly mentioned, yesterday, while
3 we were discussing today that, okay, what would happen if
4 Lehman were to be forced to provide a deponent. Would NGFP
5 also be -- have the right to force Lehman to provide the same
6 deponent? We can stipulate on the record that that's not going
7 to be the case, and we will make every effort to make that an
8 efficient process in that Lehman will only be required to do
9 that only once. Now, if Lehman is able to articulate any other
10 reason why there needs to be a technical consolidation order in
11 what substantially, in our minds, has already been procedurally
12 consolidated for procedural purposes, pre-trial purposes, then
13 we're, of course, willing to listen because like I said in the
14 beginning, we're very cognizant of the extraordinary
15 administrative burden to the Court as a result of these Chapter
16 11 cases.

17 We're certainly willing to listen and work out an
18 arrangement that will work for everyone, but what we are afraid
19 of is that, for whatever reason, as a result of the pre-trial
20 consolidation, there will be some type of preclusive effect
21 down the line on the merits of the consolidation of the trial
22 that will bind us as a result of the order.

23 Now, going to the substance of whether consolidation
24 here is merited, as we indicated in our papers -- and I'll be
25 very brief about this because I know Your Honor has thoroughly

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1 read those pleadings -- we have experienced, Mr. Bartner and I,
2 that these three entities, these three Nomura Global affiliates
3 are very different institutions. One is based in the U.K.,
4 which is Nomura International. One is based in Tokyo, which is
5 Nomura Securities Co., Limited, and Nomura Global Financial
6 Products, Inc., which is the subject of the hearing, today, is
7 based here in New York. And they engage in different
8 businesses. NGFP engages in the business of entering into
9 interest rate swaps whereas Nomura International is
10 substantially involved in credit default swaps. And those two
11 types of transactions, they're -- are extremely different, and
12 any kind of trial that we conduct will involve different
13 elements to present to the Court. In fact, given how different
14 those types of transactions are, I think the consolidation will
15 actually obfuscate, as opposed to clarify any issues. And
16 that's the kind of concern that we have with respect to a
17 consolidation hearing.

18 I won't go much further, unless Your Honor has any
19 questions. But in summary, we think the balance, here, leans
20 towards the concern regarding potential prejudice and the
21 confusion as a result of the consolidation of the proceedings
22 as opposed to any conceivable judicial economy that may result
23 from what Mr. Tambe is suggesting because that type of
24 arrangement for judicial economy purposes has already been
25 entered into as a result of the ongoing discussions and the

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1 claims objection process.

2 THE COURT: All right, thank you.

3 MR. TAMBE: Just briefly, Your Honor. I think the
4 benefit of having a consolidation order for pre-trial purposes
5 actually gives you some more procedural certainty as to exactly
6 what it is that we're doing. It's fine to have ad hoc
7 cooperation and coordinated proceedings, but I think we'd all
8 be on much surer footing as to exactly what's been
9 consolidated, what rulings are common, what issues are we
10 dealing with on a pre-trial basis, on a common basis. There's
11 rules for consolidation; the reason why they're rules for
12 consolidation and not for loose coordination is so that
13 everyone has certainty. And we respectfully would request that
14 the order be entered.

15 THE COURT: I sort of wish this had been settled along
16 with some other things that were settled this morning.

17 It's actually a nuanced question, and having read the
18 papers and having also presided over earlier pre-trials during
19 the adversary docket, I'm generally familiar with the fact that
20 Lehman takes the position that there are common issues of fact
21 having to do with the calculation of termination claims
22 associated with the swaps, regardless of whether we're dealing
23 with credit default swaps or interest rate swaps, and that
24 Nomura Global Financial Products takes the position that it is
25 in engaged in what is fundamentally a different business from

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1 the other Nomura entities that are the subject of this proposed
2 consolidation.

3 The fact that the parties have been able to work
4 cooperatively together without a consolidation order actually
5 tends to make the entire matter seem more theoretical than real
6 as a dispute. And the fact that there has been cooperation
7 leading to coordinated discovery, coordinated stipulations
8 relating to privilege and the like all indicates that this is
9 probably much ado about nothing, especially considering that
10 people have been here for hours to get to this point.

11 But this needs to be decided. I believe that
12 regardless of whether I issue a consolidation order for
13 purposes of pre-trial proceedings in this case, that I have the
14 reserved discretion to order separate trials, should I
15 determine at the conclusion of discovery that it is more
16 efficient, in light of the expert testimony and evidence for
17 the issues relating to Nomura Global Financial Products to be
18 conducted in a separate trial. In that sense, whether or not I
19 issue consolidation, there is still the ability, after parties
20 have more further -- more fully developed the record, to, in
21 effect, undo the consolidation for purposes of what happens at
22 trial.

23 Because I don't yet have enough information to
24 determine whether this can be most efficiently handled as a
25 consolidated proceeding or as a proceeding with Nomura Global

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1 Financial Products in a separate trial, I'm going to issue an
2 order of consolidation that includes within it, in effect, a
3 statement just as I've said it from the bench, which is, I
4 reserve the right following the conclusion of discovery and
5 pre-trial procedures to order a separate trial for Nomura
6 Global Financial Products, should it be shown in the future
7 that it would be more efficient to the dispute resolution
8 process for a separate hearing to be held. And I'd simply ask
9 that the consolidation order include that express statement.

10 MR. TAMBE: Your Honor, we do have a form of
11 consolidation order that we'd agreed upon for pre-trial
12 purposes reserving specifically the right to decide another day
13 whether there would be consolidation for trial purposes. We
14 could submit an agreed upon form given direction from the
15 Court.

16 THE COURT: That'd be fine.

17 MR. TAMBE: Thank you.

18 THE COURT: Okay.

19 MR. TAMBE: We'll do so this afternoon.

20 THE COURT: Then we can all go to lunch.

21 MR. TAMBE: Thank you.

22 THE COURT: We're adjourned until 2.

23 (Recess from 12:53 p.m. until 2:04 p.m.)

24 THE COURT: Be seated, please.

25 I suppose some of you waited all morning for this. We

1 start with Och-Ziff.

2 MR. BRESSLER: Good afternoon, Your Honor. Ken
3 Bressler, Blank Rome, for Och-Ziff.

4 MS. RECINE: Jennifer Recine and Rob Novick from KB --
5 Kasowitz, Benson, Torres & Friedman on behalf of the debtors.

6 THE COURT: Okay.

7 MR. BRESSLER: Your Honor, in April 2010, the debtors
8 served a very broad subpoena upon Och-Ziff seeking all records
9 relating to Lehman for all of 2008. We had several
10 conversations, I did, with various counsel over at the Kasowitz
11 firm in an attempt to narrow it unsuccessfully. And what we
12 were trying to find out is what are you looking for and why.
13 And what we finally found out in response to our objection is
14 that Lehman thinks that we may have received and may have
15 received some rumors relating to Lehman having offloaded debt
16 to hedge funds that it controlled.

17 Now, it turns out that the rumor was started by
18 someone at Lehman. Whether it's a rumor or story, I just
19 don't -- I'm not going to say. And it was reported in an
20 online newsletter called "Naked Capitalism". Now, Lehman
21 doesn't say that we actually started it. They don't say that
22 Och-Ziff actually ever saw it or passed it on. Och-Ziff, of
23 course, did see it because Och-Ziff monitors what's going on
24 out there. But let me make it very clear. This, according to
25 counsel for Lehman, was part of a short and distort scheme. In

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1 order to have a short and distort scheme, you have to be short.
2 Och-Ziff was long Lehman going into June. Och-Ziff bought 276
3 million dollars worth of common and preferred shares in June as
4 part of a secondary offering. Och-Ziff was long in Lehman
5 throughout June and at the end of June. Okay? Och-Ziff, as
6 far as we can tell, we knew about this, heard about the rumor,
7 never did pass it on, never did anything.

8 Now, the SEC has looked into all the hedge funds and
9 have asked for documents from everybody, and Och-Ziff turned
10 over documents. And this is two years ago. Since then,
11 nothing because there is nothing. Yet, we're being asked in
12 the original subpoena to give everything that would cost 3.3
13 million dollars to produce.

14 We're willing to work with them. And now that counsel
15 for Lehman has identified a particular rumor that they're
16 interested in, we've offered to give them documents during June
17 that refers to the rumor. They've turned it down. And they
18 said they want everything from March until the date that Lehman
19 filed relating to -- they'll give us search words -- search
20 terms to search for.

21 We think that we're giving a very tailored offer that
22 would be reasonable for which, while we don't think they've
23 established good cause, would be not so much of a burden that
24 we would contest it. And we ask the Court to just fashion a
25 compromise whereby we'll produce documents that refer to this

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1 rumor in June that Lehman has identified -- it's the only thing
2 they've identified through their investigation as our even
3 having likely seen or likely disseminated -- and we'd be happy
4 to turn over those documents.

5 Anything else, Your Honor, I think is not justified
6 and would be an undue and unwarranted expense not only to the
7 estate but, of course, to a non-party, Och-Ziff. Thank you.

8 MS. RECINE: That was an interesting presentation,
9 largely because the first that we ever heard in terms of a
10 willingness to produce even a single document was yesterday
11 afternoon. At that point, we were offered ten days.

12 This morning, we came back. Our compromise offer has
13 always been, from the very beginning, let's start with whether
14 or not you were in short or short-equivalent positions during
15 the relevant time period; turn over your trading records
16 subject to confidentiality -- appropriate confidentiality
17 provisions, and we'll go from there.

18 We also simultaneously asked repeatedly of Och-Ziff,
19 which they did not confirm until this morning, whether or not
20 they were a subject of the SEC investigation into market
21 participants manipulating the stocks so that they could profit
22 from their short positions. This is not a lark on our part.
23 It turns out that Och-Ziff was the target of such SEC
24 investigations. As a result, we feel that that buttresses our
25 position, which is that our investigation showed that they were

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1 involved in at least one rumor. That rumor does relate to
2 something that was ultimately published in a news report, but
3 that doesn't mean that's the extent of the rumor. That means
4 it may have made its way into the public domain through Och-
5 Ziff personally, or it may have made its way through Och-Ziff
6 because they were the recipient of that rumor from someone
7 else. It was never the case that -- it was never the case that
8 we believed, at least at the outset, that Och-Ziff was
9 necessarily the entity that was engaging in short and distort
10 practices. We believed they were an entity that would have
11 information about those who were. Of course, their complete
12 unwillingness to cooperate with us in finding a way to get the
13 information that we need has raised red flags for us, and
14 particularly, their unwillingness to share with us, despite
15 repeated requests, the fact that they were, in fact, the target
16 of an SEC subpoena.

17 At this juncture, we think the fact that they have
18 already produced these documents to the SEC, those documents
19 have probably already been reviewed for privilege, they're
20 probably in an electronic format militates against any argument
21 that there's a significant burden here for Och-Ziff. At this
22 point, as a starting place, they can certainly turn those
23 documents over to us, and if, in fact, as they suggest, they
24 not only engaged in no inappropriate behavior but also have no
25 information about any inappropriate conduct, well, then we'll

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1 leave it there. But we don't believe that that's the case.

2 THE COURT: Just ask a question or two. I looked at
3 all the paperwork that this dispute has generated, including
4 the papers that were filed as recently as yesterday. And it
5 appears that this argument is being converted into a bid and
6 ask for what will be ultimately produced. There's a
7 willingness on the part of Lehman through special counsel to
8 limit the requests, and there's a willingness on the part of
9 Och-Ziff in responding to the subpoena to turn over something
10 based upon, at least, what was said today, although Och-Ziff
11 has been characterized in the papers filed as stonewalling from
12 the very beginning.

13 Why shouldn't I simply ask the parties to do what they
14 should have done at the very outset which is to reach a
15 reasonable agreement and then proceed?

16 MS. RECINE: We're happy to do that, and we've been
17 willing to discuss this all along. Until yesterday, the answer
18 that we have received from Och-Ziff's counsel is that they
19 would produce no documents. As of yesterday, there was an
20 offer of ten days. As of today, it seems that it's expanded by
21 a few weeks. We don't think that our time period is
22 unreasonable. We also don't think our methodology is
23 unreasonable. We are willing to do this in a number of
24 different ways in order to alleviate the burden. We also
25 asked, during the process during which we were meeting and

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1 conferring, about what the specific burden was. We also
2 received no answer about that until we saw the papers. We
3 think that the discussion of burden shouldn't be credited
4 because it also does not take into account the fact that Och-
5 Ziff did, in fact, make a production to the SEC. If they're
6 willing to start with that production, I think that we can
7 reach a reasonable agreement at this point.

8 THE COURT: Was there -- I'll ask this just of Och-
9 Ziff's counsel because I have no idea what the answer is. I
10 don't know very much about the SEC investigation. What was the
11 subject matter in the documents that were turned over? Were
12 they documents within the scope of what's currently being
13 requested?

14 MR. BRESSLER: Not -- most of them were not, Your
15 Honor, firstly, but second, I would like to address Your
16 Honor's comment that the estate has claimed they were
17 stonewalling. We asked and asked.

18 THE COURT: Well, that's what the papers say.

19 MR. BRESSLER: They do. But I just want it to be
20 clear that we kept on asking why, and what are you looking for,
21 and all they kept on saying is give us all of this. We don't
22 have to tell you. The exact quote is, "That's litigation.
23 It's not how it works. We don't have to tell you anything."
24 Now we're in a situation where we've gotten something, finally,
25 from them where they said here is what we're looking at. We're

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1 looking at a specific rumor; that's what our investigation has
2 shown. Now that they have that investigation, that rumor,
3 fine. We'll respond to it. And the fact that we said the
4 17th, the day it came out, this morning, Ms. Recine said, well,
5 we would like some stuff before that, too. So we'll give it to
6 them, relating to this rumor. But anything else is uncalled
7 for. And it's not just a fishing expedition; it's harassing.
8 It goes beyond that.

9 Insofar as the SEC investigation, everything will have
10 to be re-reviewed. Firstly, a lot of the doc -- the, one, it
11 covers a period in September.

12 THE COURT: What was the SEC investigating?

13 MR. BRESSLER: They were investigating all hedge funds
14 relating to policies for short-selling, for trading, records
15 relating to Lehman and others, and for policies -- I mean, all
16 documents mentioning Lehman, Merrill Lynch, Morgan Stanley,
17 Goldman Sachs, WaMu, and AIG. They had a blunderbust (sic)
18 request to all hedge funds, all major hedge funds, not
19 investigating Och-Ziff, as counsel would have this Court
20 believe, and it's gone nowhere because there is nothing.

21 All these documents will have to be reviewed. They
22 had to be produced in very fast order, they weren't necessarily
23 reviewed for privilege. Many of them contained information
24 that is not just related to Lehman.

25 But again, most importantly, they've told us what they

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1 want, what their investigation showed. And we'll give it to
2 them, Your Honor. We'll give them what they need for what they
3 say we, quote, "likely were involved in". And I don't
4 understand why they need anything else.

5 THE COURT: What's the response to that?

6 MS. RECINE: The response to that is two-fold. One is
7 that while there is one rumor in particular that our
8 investigation showed that Och-Ziff may have been involved with,
9 our perception is that during this entire period there was an
10 extreme amount of market noise with respect to Lehman. That's
11 what this investigation is about. Because we know that Och-
12 Ziff was involved with one rumor, we have reason to believe
13 that they could have been involved with a number of the rumors
14 that were very much affecting the marketplace during a
15 relatively tight period of time. We're not talking about an
16 extensive period of time. I think it's disingenuous for Och-
17 Ziff to say, okay, well, we may have had something to do with
18 this one rumor, so we'll give you that information, but we're
19 not going to give you anything else during this time period.
20 We're willing to work with them in order to make this a
21 reasonable search. We're willing to limit custodians; we're
22 willing to limit search terms.

23 And the other really important piece here, that I
24 think that Och-Ziff would like to gloss over but I think needs
25 to be addressed is that Och-Ziff had extensive business

1 relationships with Lehman. One of the other things that Lehman
2 believes was happening during this period and one of the things
3 that Lehman's investigation showed and that our internal
4 investigation also corroborated was that entities and firms
5 with business relationships with Lehman during this period were
6 being wooed away. Other market participants and other firms
7 were coming to them and if they had a prime brokerage
8 relationship, for example, with Lehman, that competitor would
9 come to the firm, for example, Och-Ziff, and say, okay, look,
10 Lehman's falling apart. There are all these things that are
11 going on with it. These are the following issues that it has.
12 We think that you should leave Lehman Brothers and bring your
13 business to us. All of those things -- all of those things are
14 things we need to look into in order to understand what
15 happened during this period and to understand whether there is
16 a claim that ought to be pursued. Och-Ziff admits that it had
17 extensive business relationships with Lehman; it admits that it
18 had a prime brokerage relationship with Lehman. And it doesn't
19 contest the fact that it may have received information and may
20 have been the subject of efforts to win its business away from
21 Lehman Brothers.

22 THE COURT: Okay.

23 MR. BRESSLER: May I briefly respond?

24 THE COURT: Very. Very briefly.

25 MR. BRESSLER: Thank you, Your Honor. Counsel says

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1 that we say we may have been involved in this rumor. We were
2 not. We saw it. That's it. And now, if they believe they
3 should be entitled to look into other rumors because they think
4 we're involved with this, well, let them see that we're not
5 involved in this. Then they're whole basis for looking into
6 something else falls by the wayside.

7 Insofar as the prime brokerage, I have no idea what
8 Congress will claim there could be if one company says come do
9 business with us. That's not -- it's just not a claim, number
10 one. Number two, of course Och-Ziff and others pulled, at some
11 point, some prime brokerage accounts. We have 220 million
12 dollars left with Lehman in the prime brokerage account.

13 So I think they're on some type of I don't even know
14 what. I don't know what they're looking for. They just keep
15 on throwing different things at us to make it harder.

16 THE COURT: It's called a fishing expedition. That's
17 what happens in 2004.

18 MR. BRESSLER: I understand. I think it's a little
19 beyond and we're willing to be reasonable. And I think they'll
20 see how -- that Och-Ziff did nothing wrong in connection with
21 this rumor, and they'll have no reason to proceed any further.

22 THE COURT: Okay, well, disputes of this sort are the
23 very disputes that judges, wherever they sit, dislike the most.
24 This is just a garden-variety discovery dispute that's arising
25 without even litigation in the context of a 2004 order and

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1 subpoena that, candidly, never should've gotten to this point.
2 The fact that counsel had to be at the tail end of an omnibus
3 hearing, literally for hours, wasting their time, maybe is
4 punishment enough for you.

5 The parties have filed declarations, supplemental
6 briefs, everybody trying to show how reasonable they're being.
7 Obviously, nobody's being that reasonable.

8 The notion that this is a three-plus million dollar
9 job is a complete distortion and not credible. I am not going
10 to grant the discovery request in full, but I am inclined to be
11 very liberal under the ambit of Rule 2004 in giving the debtor
12 a fairly wide berth in terms of exploring whatever questions
13 they have regarding the role of Och-Ziff. It is premature to
14 argue the merits of a subpoena by, in effect, assuming that the
15 answer is there's nothing here for anybody to discover. The
16 only way to know if there's anything to discover is to actually
17 produce the requested documents.

18 I'm going to direct the parties to meet and confer
19 today and to report to me by 5 o'clock today what progress you
20 have made, and I expect there to be progress. If you would
21 like, for convenience, to use the conference room across from
22 my chambers, you're free to do that. If you want to go to
23 somebody's office and be more comfortable and get coffee,
24 that's fine, too. But I expect a telephone call to chambers no
25 later than 5 p.m. And depending on the results of that call,

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1 we'll either have a further conference on the record, or we'll
2 discover what next will happen. But there will be discovery;
3 it's just a question of the scope and the burden. I'm sure you
4 can work it out. You're both experienced on both sides.

5 MR. BRESSLER: Thank you.

6 (Pause)

7 THE COURT: Lehman v. USA.

8 MR. MADAN: Good afternoon, Your Honor. Raj Madan,
9 Bingham McCutcheon for the debtors.

10 MR. CORDARO: Good afternoon, Your Honor. Joseph
11 Cordaro, Assistant United States Attorney on behalf of the
12 United States.

13 MR. COHEN: David Cohen, Milbank, Tweed, Hadley &
14 McCloy here on behalf of the official committee for unsecured
15 creditors.

16 MR. TOMBACK: Andrew Tomback, Milbank, on behalf of
17 the committee for unsecured creditors, Your Honor.

18 MS. RANKIN: Kiara Rankin on behalf of LBHI.

19 THE COURT: Okay. This is just a pre-trial. I see
20 from the docket that the government has filed a motion relating
21 to the reference because of the tax issues involved here. It
22 appears to have been filed as recently as yesterday.

23 You don't all have to stand; you can try to make
24 yourselves comfortable.

25 This isn't an opportunity to talk about that. I've

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1 taken a quick look at the papers that were filed just to see
2 what they're about, and I don't know whether that was expected
3 or unexpected on the part of the government, and it certainly
4 looks to me as if somebody's going to be responding to that or
5 agreeing to it, one or the other. But how does that affect
6 today's pre-trial?

7 MR. MADAN: May I, Your Honor?

8 THE COURT: Sure.

9 MR. MADAN: First of all, the government's motion to
10 withdraw the reference was expected. We have been in
11 discussions with the government for some time about this issue.
12 It's -- directly answering your question, and then I'm going to
13 come back to what I think our position is going to be, I don't
14 think it should affect the pre-trial conference in setting a
15 schedule for discovery. I think we should proceed with the
16 setting of discovery, and here's why.

17 While you're right, we've only had a short time to
18 review the papers, and we're still formulating a definitive
19 position, directionally, where we're headed is to consent to
20 withdraw the reference, which may seem a little bit
21 inconsistent with my earlier comment. But the reason for that,
22 Your Honor, is we are inclined to oppose the motion to withdraw
23 the reference for purposes of discovery. By that I mean, we
24 think it would be more efficient for the parties to conduct
25 discovery in this court. And the reason for that is that the

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1 primary discovery is third party discovery that will be
2 conducted from LBIE, and I think this Court is familiar with
3 the complexities of dealing with Lehman's former affiliate in
4 the U.K., the U.K. broker-dealer LBIE. And we think this
5 Court, Your Honor, is in a better position to help resolve any
6 issues we have with LBIE to the extent a dispute arises.

7 We are already in informal discussions and have been
8 for a few months, now, with the administrator there at PwC in
9 attempting to obtain documents. Not unexpectedly, that process
10 is taking a while. There's bureaucracy and there's a fair
11 amount of back and forth. But there are certain issues that
12 have arisen, for example, data privacy questions, questions
13 about how long this data goes back, which leads me to believe
14 that at some point, there may need to be some involvement by
15 this Court with obtaining information. And it's our
16 perspective, the debtors' perspective, which I think is shared
17 by the creditors' committee, that some efficiency would be
18 gained given your experience with dealing with affiliates
19 generally in this multinational bankruptcy process, but in
20 particular, with respect to LBIE and, frankly, from what I've
21 seen on the docket, certain U.K. discovery issues to the extent
22 letters rogatory need to be issued under the Hague Convention.

23 So in summary, I think we're willing to consent to the
24 withdraw of reference, but what we're inclined to do is ask the
25 federal district court to leave the case in bankruptcy court

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1 for discovery purposes for the reasons I just mentioned.

2 THE COURT: What does everybody else think of that
3 idea?

4 MR. CORDARO: Good afternoon, Your Honor. Joseph
5 Cordaro for the United States. At this point, Your Honor, the
6 government's view of the efficiencies is actually that if the
7 district court withdraws the reference, then it makes most
8 sense for the case that the district court would supervise
9 discovery. And it's my impression that, typically, that's what
10 happens, although the government is aware of some cases where
11 the district court has allowed the -- has withdrawn the
12 reference and allowed the case to remain with the bankruptcy
13 court for discovery. That has happened in the past.

14 THE COURT: I think that's actually the most typical
15 model.

16 MR. CORDARO: But Your Honor, as Mr. Madan referred to
17 in the end of his comments, actually, that's going to be a
18 question for the district judge to decide, and I think that's
19 an argument that we can have before him at that time.

20 THE COURT: Or her.

21 MR. CORDARO: Or her -- actually, the case has --

22 THE COURT: Has it been assigned?

23 MR. CORDARO: No, the case has been assigned; it's
24 been assigned to Judge Berman. But insofar as the setting of a
25 discovery schedule goes, it is a way of getting the case --

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1 getting some dates into the case at this point. Of course, I
2 mean, there's the recognition that should the matter be
3 withdrawn, the district judge probably is going to look at this
4 anew and may modify the schedule as he pleases or not. But I
5 do think to answer the question that Your Honor put, insofar as
6 this conference is concerned, I mean, it does make sense to
7 discuss deadlines, and we've been having discussions along
8 those lines as well as in reference to withdrawing the
9 reference.

10 THE COURT: Okay, I'll hear from the committee.

11 MR. CORDARO: Thank you, Your Honor.

12 MR. TOMBACK: Your Honor, Andrew Tomback, Milbank, for
13 the committee. It's rare that I'm in a position to agree with
14 everybody, but first of all, I certainly agree with the notion
15 that we should move forward and ask Your Honor respectfully to
16 sign the order. I think that it would help things to get going
17 not just informally but formally.

18 And then secondly, whether the case is actually
19 formally withdrawn and then referred back to Your Honor or, I
20 guess the most well-known case to me, at least, is Keene Corp.
21 (ph.), a Judge Duffy case, where he deferred ruling on the
22 withdrawal issue and left the case in the bankruptcy court for
23 much longer than just discovery, and there's precedent --
24 Shugrue and PBGC -- precedent for the withdrawal of the case
25 and then refer back. We fill strongly that's appropriate, not

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1 just because of what Your Honor sees, but I've had the pleasure
2 of working with LBIE in trying to obtain documents informally.

3 THE COURT: You described that as a pleasure?

4 MR. TOMBACK: Well, I was being facetious, Your Honor.
5 And it's tough. And I've watched Your Honor deal with
6 discovery on a multiple issues vis-a-vis LBIE, for that matter,
7 the client here, LBHI. I think there's a tremendous advantage
8 that Your Honor has in doing so, and I don't think that it
9 would hurt, necessarily, Judge Berman in his ability to handle
10 the case thereafter, if Your Honor does that. So I agree, of
11 course, with the debtor, as well.

12 THE COURT: Okay. Here's what I think makes sense.

13 First of all, I commend the parties in recognizing that the
14 legal issues that are presented in this adversary proceeding
15 are unusual non-bankruptcy issues of first impression, as far
16 as I can tell -- but I'm not characterizing it other than to
17 say that -- and that the process of managing the case
18 cooperatively with the district court is something that I
19 believe both Judge Berman and I would welcome if the parties
20 could reach what I'll suggest is a protocol for managing
21 discovery and trial cooperatively in the context of a
22 consensual withdrawal of the reference by stipulation.

23 I hear no major pushback on the notion that there are
24 predominant non-bankruptcy issues that are at the root of this
25 dispute and that it would be most efficient, regardless of

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1 mandatory withdrawal, for the district court to be the first
2 trial court that considers the case for dispute resolution.
3 Whether the district court or this court represents the better
4 place to deal with pretrial and discovery issues, I'm frankly
5 not prepared to say, and it may be that for calendaring
6 purposes and other administrative purposes that Judge Berman
7 would prefer to manage the discovery phase of the case unless
8 the parties otherwise had a stipulation which he could easily
9 agree to. And I'm not going to prejudge that, here. But I do
10 think that it makes sense for the parties, promptly, to
11 develop, if they haven't already started this process, a
12 schedule for the completion of discovery, dispositive motions,
13 dealing with experts to the extent experts are involved, and
14 that to the extent that there is some work that's already been
15 done on that subject, we could maybe move forward with that
16 right away.

17 MR. MADAN: Yeah, I don't mean to interrupt, Your
18 Honor, but we did file on the docket, on Monday, an agreed
19 discovery plan which includes all the dates you just
20 identified. If you'd like, I can approach the bench with --

21 THE COURT: I saw the motion for withdrawal of
22 reference. I didn't see this. Thank you.

23 Well, if you've already done that, and if everybody's
24 already signed it and all it requires is my signature, it shall
25 be done.

1 MR. MADAN: Thank you, Your Honor.

2 THE COURT: Now, is there more for this conference, or
3 does that really take care of it?

4 MR. MADAN: That takes care of it from the debtors'
5 side, Your Honor.

6 MR. CORDARO: Nothing from the government, Your Honor.

7 THE COURT: Okay.

8 MR. TOMBACK: Just appreciation from us, Your Honor.

9 THE COURT: My suggestion is that I will arrange for a
10 relatively prompt entry of the order relating to the scheduling
11 and discovery plan, but it does seem to me that it would be in
12 the interest of the parties to consider together how best to
13 most efficiently manage the discovery process which has been
14 outlined in this order. And I have no particular preference
15 one way or the other. I think if the parties believe that
16 there are efficiencies associated with keeping the discovery
17 process within the bankruptcy court, I have, certainly, no
18 objection to that and I'd be pleased to preside with respect to
19 any matters that may come up during the discovery phase of the
20 case. But if there's lack of consensus on that point, I'll
21 leave it to others to decide how best to handle this, including
22 Judge Berman when he hears what will turn out to be a
23 consensual -- I think it will turn out to be a consensual
24 motion of withdrawal of the reference.

25 I suspect that both he and I share the view that it

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1 would be desirable, to the extent unnecessary disputes can be
2 minimized, that the parties think about what makes the most
3 sense. There probably isn't an advocate's view of that. There
4 probably is a better view as to how to deal with foreign
5 discovery issues. And I have no preference. Do whatever you
6 think is best. And if you don't have an agreement, I'll leave
7 it to Judge Berman to decide. All right?

8 MR. MADAN: Thank you, Your Honor.

9 MR. CORDARO: Thank you, Your Honor.

10 THE COURT: We're adjourned for the day. Thank you.

11 (Proceedings concluded by 2:36 PM)

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1 I N D E X

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3 T E S T I M O N Y

4	WITNESS	EXAM BY	PAGE	LINE
5	Jeff Fitts	(Via proffer)	38	12
6	Jeff Fitts	Mr. Kuntz	45	5
7	Michael Lascher	(Via proffer)	70	20

8

9

10 R U L I N G S

11	DESCRIPTION	PAGE	LINE
12	Motion of Lehman Brothers Holdings Inc.	26	21
13	and Lehman Commercial Paper Inc. to Amend		
14	the RACERS Transaction Documents, granted.		

15

16	Proffer of Jeff Fitts is accepted as	43	24
17	direct testimony.		

18

19	Debtors' Motion for an Order (i) Allowing	55	12
20	LCPI to Acquire Certain Loans through a		
21	Joint Venture and (ii) Authorizing LCPI		
22	and LBHI to Provide Gap Funding through a		
23	Term Loan, Revolver, and Preferred Equity		
24	Investment, approved.		

25

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2 R U L I N G S (con't.d)

	DESCRIPTION	PAGE	LINE
4	LBHI's Motion for (i) Approval of Surrender	65	8
5	Agreement in Connection With Surrender of		
6	Real Property Lease and (ii) Authorization		
7	to Abandon Certain Personal Property, adjourned		
8	if there remain objections after discussion		
9	between the parties.		
10			
11	Motion of Lehman Brothers Holdings Inc.	64	24
12	and Lehman Commercial Paper Inc. for		
13	Authorization to Guarantee Payment of the		
14	Fees and Related Charges of Lazard Freres		
15	& Co. LLC, granted.		
16			
17	Proffer of Jeff Fitts is accepted as	78	7
18	direct testimony.		
19			
20			
21			
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2 R U L I N G S (con't.d)

	DESCRIPTION	PAGE	LINE
4	Motion of Lehman Commercial Paper Inc.	114	9
5	for Authority to (i) Consent to its Non-		
6	Debtor Affiliate Lehman ALI Inc. (a)		
7	Entry into Plan Support Agreement		
8	Related to the Restructuring of Innkeepers		
9	USA Trust; and (b) Consummation of the		
10	Transactions Set Forth in the Plan Term		
11	Sheet; and (ii) Provide Funds to Solar		
12	Finance Inc., a Non-Debtor Affiliate,		
13	to Provide Debtor-in-Possession		
14	Financing,		
15			
16	Motion of Debtors and Debtors in	124	2
17	Possession for Entry of an Order to		
18	Consolidate Certain Proceedings and		
19	Establish Related Procedures, granted.		
20			
21	Discovery plan approved.	142	25
22			
23			
24			
25			

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C E R T I F I C A T I O N

3

4 I, Clara Rubin, certify that the foregoing transcript is a true
5 and accurate record of the proceedings.

6

7

8 Clara Rubin

9 AAERT Certified Electronic Transcriber (CET**D-491)

10 Also transcribed by: Sharona Shapiro (CET**D-492)

11

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17 Date: August 19, 2010

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